

**THE 60TH ANNIVERSARY OF THE ADMINISTRATIVE
PROCEDURE ACT: WHERE DO WE GO
FROM HERE?**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

JULY 25, 2006

Serial No. 109-133

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

28-907 PDF

WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
STEVE CHABOT, Ohio	MELVIN L. WATT, North Carolina
DANIEL E. LUNGREN, California	ZOE LOFGREN, California
WILLIAM L. JENKINS, Tennessee	SHEILA JACKSON LEE, Texas
CHRIS CANNON, Utah	MAXINE WATERS, California
SPENCER BACHUS, Alabama	MARTIN T. MEEHAN, Massachusetts
BOB INGLIS, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
JOHN N. HOSTETTLER, Indiana	ROBERT WEXLER, Florida
MARK GREEN, Wisconsin	ANTHONY D. WEINER, New York
RIC KELLER, Florida	ADAM B. SCHIFF, California
DARRELL ISSA, California	LINDA T. SANCHEZ, California
JEFF FLAKE, Arizona	CHRIS VAN HOLLEN, Maryland
MIKE PENCE, Indiana	DEBBIE WASSERMAN SCHULTZ, Florida
J. RANDY FORBES, Virginia	
STEVE KING, Iowa	
TOM FEENEY, Florida	
TRENT FRANKS, Arizona	
LOUIE GOHMERT, Texas	

PHILIP G. KIKO, *Chief of Staff-General Counsel*

PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

CHRIS CANNON, Utah *Chairman*

HOWARD COBLE, North Carolina	MELVIN L. WATT, North Carolina
TRENT FRANKS, Arizona	WILLIAM D. DELAHUNT, Massachusetts
STEVE CHABOT, Ohio	CHRIS VAN HOLLEN, Maryland
MARK GREEN, Wisconsin	JERROLD NADLER, New York
J. RANDY FORBES, Virginia	DEBBIE WASSERMAN SCHULTZ, Florida
LOUIE GOHMERT, Texas	

RAYMOND V. SMETANKA, *Chief Counsel*

SUSAN A. JENSEN, *Counsel*

BRENDA HANKINS, *Counsel*

MIKE LENN, *Full Committee Counsel*

STEPHANIE MOORE, *Minority Counsel*

CONTENTS

JULY 25, 2006

OPENING STATEMENT

	Page
The Honorable Chris Cannon, a Representative in Congress from the State of Utah, and Chairman, Subcommittee on Commercial and Administrative Law	1
The Honorable Melvin L. Watt, a Representative in Congress from the State of North Carolina, and Ranking Member, Subcommittee on Commercial and Administrative Law	3

WITNESSES

Professor William West, The Bush School of Government and Public Service, Texas A&M University, College Station, TX	
Oral Testimony	46
Prepared Statement	48
Professor Marshall Breger, The Catholic University of America—Columbus School of Law, Washington, DC	
Oral Testimony	53
Prepared Statement	56
Professor M. Elizabeth Magill, University of Virginia School of Law, Charlottesville, VA	
Oral Testimony	69
Prepared Statement	73
Professor Cary Coglianese, University of Pennsylvania Law School, Philadelphia, PA	
Oral Testimony	77
Prepared Statement	81

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable Chris Cannon, a Representative in Congress from the State of Utah, and Chairman, Subcommittee on Commercial and Administrative Law	2
Material submitted by Chairman Cannon from the Federal Administrative Law Judges Conference	5

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Revised Prepared Statement of Professor M. Elizabeth Magill, University of Virginia School of Law, Charlottesville, VA	107
Response to Post-Hearing Questions from Professor William West, The Bush School of Government and Public Service, Texas A&M University, College Station, TX	112
Response to Post-Hearing Questions from Professor Marshall Breger, The Catholic University of America—Columbus School of Law, Washington, DC	116
Response to Post-Hearing Questions from Professor M. Elizabeth Magill, University of Virginia School of Law, Charlottesville, VA	122
Response to Post-Hearing Questions from Professor Cary Coglianese, University of Pennsylvania Law School, Philadelphia, PA	124

THE 60TH ANNIVERSARY OF THE ADMINISTRATIVE PROCEDURE ACT: WHERE DO WE GO FROM HERE?

TUESDAY, JULY 25, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:30 a.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. The Committee on the Judiciary's Subcommittee on Commercial and Administrative Law will come to order.

The current Federal regulatory process faces many significant challenges. Just last week, the Subcommittee on Commercial and Administrative Law conducted a hearing on legislation aimed at addressing various loopholes and recurrent inefficiencies involving the Regulatory Flexibility Act of 1980. As this hearing revealed, these shortcomings in the regulatory process translate into real costs that are borne by every American.

Other problematic issues that have arisen over the years in the area of administrative law and procedure include the absence of transparency at certain stages of the rulemaking process, the increasing incidence of agencies publishing final rules without having them first promulgated on a proposed basis, the stultification of certain aspects of the rulemaking process, and the need for more consistent enforcement by agencies.

Given the fact that the Administrative Procedure Act was enacted more than 60 years ago, a fundamental question that arises is whether the act is still effective in the 21st century.

To help us answer that question, House Judiciary Committee Chairman Sensenbrenner, with the active support of Ranking Member Conyers, last year asked our Subcommittee to spearhead the Administrative Law Process and Procedure Project.

With the objective of conducting a nonpartisan, academically credible analysis, the project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research to be considered by the hopefully soon-to-be reactivated Administrative Conference of the United States.

As many of you know, ACUS was an independent agency that served as a think-tank and made numerous recommendations that

improved efficiency, adequacy, and fairness of the procedure used by agencies to carry out administrative programs. We are particularly pleased that Professor Breger, who previously served 6 years as the chairman of ACUS, is here to share his views on the state of the APA, especially in light of his experience with ACUS.

Today's hearing is one of a series of programs and hearings that our Subcommittee has conducted as part of this project. In addition to the Regulatory Flexibility Act, the Subcommittee conducted a hearing on the Congressional Review Act, as well as a hearing on the project itself.

The Subcommittee has also cosponsored two symposia as part of the project. The first symposium, held last December, focused on Federal e-Government initiatives. This program, chaired by Professor Coglianese, examined the executive branch's efforts to implement e-rulemaking across the Federal Government. Professor Coglianese will provide a summary of that symposium for us today, as well as an update on subsequent developments, especially with respect to the Government-wide Federal docket management system.

The Subcommittee's second symposium examined the role of science in the rulemaking process. Issues considered at that program included OMB's recent initiative dealing with regulatory science and the role of science advisory panels.

A further symposium is planned for September 11, 2006, which will examine such issues as the respective roles that the executive and legislative branches play in the rulemaking process. As part of the project, several studies are also being conducted. One of these studies, which another of our witnesses, Professor Bill West, will discuss today, examines how agencies develop proposed rules.

While the APA generally requires agencies to involve the public in the rulemaking process by publishing notices of proposed rulemaking to which the public can submit comments, critical decisions regarding proposed rules are often made in the months and perhaps even years before rules are published. Surprisingly, little is known about how agencies actually develop these rules. Professor West's study will shed some light on this heretofore unexamined area of the rulemaking process.

At this time, I would like to extend, on behalf of the Subcommittee, our thanks to the Congressional Research Service for funding this very much needed research and for its role, as particularly exemplified by Mort Rosenberg and Curtis Copeland, in coordinating this and other research endeavors for the project. As Professor Magill will later explain, the need for empirical research is not being met. This gap only emphasizes the need to reactivate ACUS.

I now turn to my colleague, Mr. Watt, the distinguished Ranking Member of the Subcommittee, and ask him if he has any opening remarks.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The current federal regulatory process faces many significant challenges. Just last week, the Subcommittee on Commercial and Administrative Law conducted a hear-

ing on legislation aimed at addressing various loopholes and recurrent inefficiencies involving the Regulatory Flexibility Act of 1980. As this hearing revealed, these shortcomings in the regulatory process translate into real costs that are borne by every American.

Other problematic issues that have arisen over the years in the area of administrative law and procedure include the absence of transparency at certain stages of the rulemaking process, the increasing incidence of agencies publishing final rules without having them first promulgated on a proposed basis, the stultification of certain aspects of the rulemaking process, and the need for more consistent enforcement by agencies.

Given the fact that the Administrative Procedure Act was enacted more than 60 years ago, a fundamental question that arises is whether the Act is still effective in the 21st Century.

To help us answer that question, House Judiciary Committee Chairman Sensenbrenner—with the active support of Ranking Member Conyers—last year asked our Subcommittee to spearhead the Administrative Law, Process and Procedure Project. With the objective of conducting a nonpartisan, academically credible analysis, the Project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research to be considered by the hopefully soon-to-be reactivated Administrative Conference of the United States.

As many of you know, ACUS was an independent agency that served as a think tank and made numerous recommendations that improved the efficiency, adequacy, and fairness of the procedure used by agencies to carry out administrative programs. We're particularly pleased that Professor Breger, who previously served six years as the Chairman of ACUS, is here to share his views on the state of the APA especially in light of his experience with ACUS.

Today's hearing is one of a series of programs and hearings that our Subcommittee has conducted as part of this Project. In addition to the Regulatory Flexibility Act, the Subcommittee conducted a hearing on the Congressional Review Act as well as a hearing on the Project itself.

The Subcommittee has also cosponsored two symposia as part of the Project. The first symposium, held last December, focused on federal e-government initiatives. This program, chaired by Professor Coglianese (pronounced "Co-lone-niece"), examined the Executive Branch's efforts to implement e-rulemaking across the federal government. Professor Coglianese will provide a summary of that symposium for us today as well as an update on subsequent developments especially with respect to the government-wide Federal Docket Management System.

The Subcommittee's second symposium examined the role of science in the rulemaking process. Issues considered at that program included OMB's recent initiatives dealing with regulatory science and the role of science advisory panels.

A further symposium is planned for September 11, 2006, which will examine such issues as the respective roles that the executive and legislative branches play in the rulemaking process.

As part of the Project, several studies are also being conducted. One of these studies, which another of our witnesses—Professor Bill West—will discuss today, examines how agencies develop proposed rules.

While the APA generally requires agencies to involve the public in the rulemaking process by publishing notices of proposed rulemaking to which the public can submit comments, critical decisions regarding proposed rules are often made in the months and perhaps even years before rules are published. Surprisingly, little is known about how agencies actually develop these rules. Professor West's study will shed some light on this heretofore unexamined area of the rulemaking process.

At this time I would like to extend—on behalf of the Subcommittee—our thanks to the Congressional Research Service for funding this very much needed research and for its role, as particularly exemplified by Mort Rosenberg and Curtis Copeland, in coordinating this and other research endeavors for the Project. As Professor Magill will later explain, the need for empirical research is not being met. This gap only emphasizes the need to reactivate ACUS.

Mr. WATT. Thank you, Mr. Chairman.

I thank the Chairman for convening this hearing and for the very important and strong and committed leadership role that he has played in taking the charge of our Chairman, Mr. Sensenbrenner, and the Ranking Member, seriously and studying this area.

Today, as he has indicated, we will hear from noted scholars on various aspects of the Administrative Procedure Act. APA is as important now as it was when it was first enacted in 1946. From Administration to Administration, whether Democratic or Republican, the role of the administrative agencies in our political system cannot be underestimated.

Although recently new entities have emerged to compete for the title of fourth branch of Government, such as the media, lobbyists and corporate interests, of course, there is no doubt that our administrative agencies continue to exercise power officially reserved for the first three branches, or power not defined by the Constitution at all.

The Administrative Procedure Act is a necessary tool to ensure that the power conferred upon the agencies is not abused and that it is exercised efficiently and fairly. Our rapidly changing technological landscape requires that we look to see whether the APA requires modernization to ensure that fairness and efficiency remain viable.

So I look forward to hearing from the witnesses about the various developments in the area of administrative rulemaking and the regulatory process, with an eye toward improving and strengthening the process.

My staff person has just reminded me that if the APA is 60 years old, it is a baby-boomer. So we need to be researching our own roles. Maybe we have two baby-boomers here, trying to figure out what to do about another baby-boomer. So everybody is studying age and growing old. It is time that we do it on the APA.

Thank you. I yield back.

Mr. CANNON. I thank the gentleman.

Without objection, the gentleman's statement will be placed in the record. Hearing no objection, so ordered.

Without objection, all Members may place their statements on the record at this point. Hearing no objection, so ordered.

Without objection, the Chair will be authorized to declare recesses of the hearing at any point. Hearing no objection, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. Hearing no objection, so ordered.

Some of the witnesses have asked for additional time to submit more formal statements. We appreciate your willingness to be here, and in a couple of cases on relatively short notice, and so I ask unanimous consent that the witnesses be allowed 5 days within which to submit more formal statements. Hearing no objection, so ordered.

At this point, I would like to submit on unanimous consent a statement from the Federal Administrative Law Judges Conference for inclusion in the record. Hearing no objection, so ordered.

[The material referred to follows:]

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762DIRECTIONS
Robert H. Fagan
(202) 662-1760
rfagan@abafed.orgDEPUTY DIRECTOR
Deborah A. Cardman
(202) 662-1761
dcardman@abafed.orgSENIOR LEGISLATIVE COUNSEL
S. Larson Frisby
(202) 662-1076
sfrisby@abafed.org
T. Brian A. Guden
(202) 662-1761
tguden@abafed.orgLEGISLATIVE COUNSEL
Kathleen E. Guden
(202) 662-1761
kguden@abafed.orgKenneth J. Guden
(202) 662-1761
kguden@abafed.orgAmy M. Lawrence
(202) 662-1761
alawrence@abafed.orgHelen M. Lawrence
(202) 662-1761
hlawrence@abafed.orgL. Bruce Nicholson
(202) 662-1761
lnicholson@abafed.orgDIRECTOR OF COMMUNICATIONS
AND CONSULTANT
M. M. Sweeney
(202) 662-1761
msweeney@abafed.orgINTELLECTUAL PROPERTY
LAW CONSULTANT
Helen C. Guden
(202) 662-1761
hguden@abafed.orgSTAFF LEGISLATIVE COUNSEL
R. C. Apple
(202) 662-1761
rapple@abafed.orgEXECUTIVE ASSISTANT
Dawn R. Baskin
(202) 662-1761
dbaskin@abafed.orgSTAFF DIRECTOR OF
COMMUNICATIONS
Sharon L. Guden
(202) 662-1761
sguden@abafed.orgWASHINGTON LETTER
Brenda L. McNeill
(202) 662-1017

July 25, 2006

The Honorable Chris Cannon
Chair
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "The 60th Anniversary of the Administrative Procedure Act
(P.L. 79-404): Where Do We Go From Here?"

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write to advise your subcommittee of the great interest that the ABA, particularly its Section of Administrative Law and Regulatory Practice (the "Section") and its Judicial Division's National Conference of the Administrative Law Judiciary ("NCALJ"), has in the subject of today's scheduled hearing on "The 60th Anniversary of the Administrative Procedure Act (P.L. 79-404): Where Do We Go From Here?" The 60th anniversary of the Administrative Procedure Act ("APA") is indeed an important milestone and we are most grateful for the opportunity to participate in this celebration. It is our hope that we can work with you and your Subcommittee on possible administrative law reforms. As the Chair of the Section, I have been authorized to express the ABA's views on this important subject and request that this letter be included in the official record of today's Subcommittee hearing.

The ABA, including the Section of Administrative Law and Regulatory Practice and NCALJ, has a longstanding interest in the APA and its improvement. Accordingly, the ABA has adopted policy on a host of issues regarding the APA over the years, including reforms in rulemaking, public information and judicial review. In 2001, the Section completed a comprehensive review of the APA culminating in a restatement of administrative law.¹ The most recent ABA policy pertaining to the APA is a resolution proposing amendments to some sections of the APA relating to adjudication. We request that your Subcommittee give due consideration to this proposed amendment during your reexamination of the APA.

¹ American Bar Association Section on Administrative Law and Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 17 (2001).

July 25, 2006
Page 2

Below we have highlighted some issues of pressing concern to the ABA. These include: amendment of the adjudication provisions of the APA, reauthorization and appropriation of funds for the Administrative Conference of the United States, and creation of the "Administrative Law Judge Conference of the United States."

1. Proposed Changes in APA Adjudication

The rulemaking, public information, and judicial review provisions of the APA apply to all federal agencies (with specific exceptions). However, this is *not* the case with the adjudication sections of the APA (primarily sections 554, 556 and 557). These sections presently apply only to a small subset of the subject matter of federal agency adjudications: Social Security Act disability, old-age and survivors benefits claims, Medicare claims, labor law cases, and certain hearings conducted by about 20 other independent regulatory agencies and other Executive Branch agencies. We call these Type A hearings.

These APA provisions guarantee basic, fundamental fairness. They provide for the right to present evidence and confront the opponent's evidence; require an impartial decision-maker; prohibit ex parte contacts; require separation of adjudicatory from advocacy functions within the agency; and require a statement of findings and reasons. Unfortunately, however, the APA adjudication provisions do not apply under present law to a vast number of adjudications in which an evidentiary hearing is required by federal statutes. Some of the excluded hearings are cases involving immigration and asylum, veterans' benefits, government contract disputes, civil money penalties, security clearances, IRS collection disputes, and about 80 other hearing schemes. We call these Type B hearings. There is no logical reason for the distinction between Type A and Type B hearings. Yet the number of statutes calling for Type B hearings is steadily increasing while the number of statutes calling for Type A hearings remains relatively constant. The APA should apply to all adjudicatory hearings required by statute that are conducted by federal agencies.

In 2005, the ABA adopted a resolution urging Congress to apply the adjudication provisions of the APA to Type B adjudication for the first time. This ABA policy, attached as Appendix A, includes draft legislative language as well as a detailed explanatory report. The ABA strongly urges the Subcommittee to support the APA reforms outlined in this resolution.

Although the ABA's proposal would subject Type B hearings to the adjudication provisions of the APA, one important part of the existing APA would *not* be applied to Type B hearings under our proposal. Specifically, these hearings would not be conducted by administrative law judges ("ALJs"). In an ideal world, ALJs would preside in all hearings required by federal statutes, but this does not appear to be feasible at this time. Nonetheless, these proposed reforms would offer vastly more protection to persons litigating against federal agencies than is provided by existing law.

In addition to expanding the APA adjudication provisions to Type B hearings, the ABA's policy proposal calls for a number of other significant changes in these provisions. In particular, it: (1) mandates the adoption of a code of ethics for all administrative presiding officers, whether they serve in Type A or Type B hearings; (2) provides protection for full-time Type B presiding officers against dismissal without good cause; (3) expands the opportunity to seek a declaratory order; and

July 25, 2006
Page 3

(4) clarifies various definitions in the existing Act that have caused confusion – in particular, the definition of a “rule.”

The drafters of the APA wanted to achieve uniformity of procedure in federal administrative law. They achieved that goal with respect to rulemaking, judicial review, and freedom of information, but they did not achieve it with respect to adjudication. Since 1946, a vast number of Type B hearing schemes have emerged that fall outside the APA’s protective umbrella. The ABA’s recommended reforms would bring Type B hearings under the APA umbrella, which in turn would assure fair administrative procedures to generations of future litigants who find themselves in disputes with federal agencies.

2. Administrative Conference of the United States

In the Federal Regulatory Improvement Act of 2004, P. L. 108–401, Congress reauthorized the Administrative Conference of the United States (“ACUS”) for fiscal years 2005, 2006, and 2007. This reauthorization comports with long-standing ABA policy supporting ACUS and its reauthorization. Specifically, the ABA adopted policy in February 1989 that calls for reauthorization of ACUS with funding sufficient to permit the agency to continue its role as the government’s coordinator of administrative procedural reform. A copy of this ABA policy statement is attached as Appendix B. In our view, a revitalized ACUS could play a crucial role in the future development of the federal APA. Indeed, ACUS would be an ideal forum for exploring just the sort of comprehensive reevaluation of the APA that the Subcommittee has initiated. It could provide a vital, inclusive and prestigious adjunct to the Subcommittee’s work.

ACUS was originally established in 1964 as a permanent body to serve as the federal government’s in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. Through the years, ACUS was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The ABA and its Section on Administrative Law and Regulatory Practice strongly supported the reauthorization of ACUS in 2004 and we applaud your strong leadership in both sponsoring and facilitating the passage of the legislation that made this possible. Since ACUS was reauthorized in 2004, the ABA has been honored to work with you and your staff in an effort to secure adequate funding for the reconstituted agency from Congress. As part of that effort, the ABA sent a letter to the Senate Appropriations Committee on July 18, 2006, urging them to provide funding for ACUS for fiscal year 2007 at the fully authorized level of \$3.2 million. A copy of that letter is attached as Appendix C.

As the ABA explained in its correspondence to the Senate Appropriations Committee, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. Unfortunately, neither the Senate nor the House Appropriations Committees have approved the funding that ACUS needs to reconstitute its staff, secure office space and supplies, and resume its critical work. Therefore, the ABA urges you and the Subcommittee to continue your efforts to

July 25, 2006
Page 4

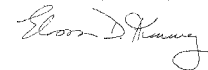
secure funding for ACUS for fiscal year 2007. In addition, whether or not ACUS receives this critical funding this year, we urge you to support legislation in the new 110th Congress that would reauthorize ACUS for fiscal year 2008 and beyond so that it can continue its vital mission.

3. Administrative Law Judge Conference of the United States

The ABA also encourages Congress to establish the proposed Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management ("OPM") with respect to Administrative Law Judges ("ALJs"), including their testing, selection, and appointment. The ABA's proposal, adopted by the ABA House of Delegates in August 2005 and attached as Appendix D, would maximize administrative efficiency by consolidating services, promoting professionalism, promoting public confidence in administrative decision-making, ensuring high ethical standards for administrative law judges, and providing necessary Congressional oversight. Therefore, the ABA strongly urges the Subcommittee to support this proposal by approving legislation that would formally establish the ALJ Conference of the United States.

Thank you for considering the views of the ABA, the Section of Administrative Law and Regulatory Practice, and NCALJ on these critical issues. We stand ready to assist you and the Subcommittee in a reexamination of the APA at its 60th anniversary. We will be contacting your staff shortly to consider next steps. In the meantime, if you would like to discuss the ABA's views in greater detail, please feel free to contact me at 317/274-4091 or the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



Eleanor D. Kinney, Chair
ABA Section of Administrative Law and Regulatory Practice

cc: Members of the Subcommittee on Commercial and Administrative Law
The Honorable Jodi B. Levine, ABA Judicial Division

RECOMMENDATION 114
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION

February 14, 2005*

RESOLVED, That the American Bar Association urges Congress to amend and modernize the adjudication provisions of the Administrative Procedure Act and to expand certain fundamental fair hearings provisions of that Act by enacting legislation consistent with the attached draft bill entitled "Federal Administrative Adjudication in the 21st Century," dated February 2005, recognizing the administrative law judge adjudication as the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

FEDERAL ADMINISTRATIVE ADJUDICATION
IN THE 21ST CENTURY ACT

A BILL

To amend title 5, United States Code, to modernize the adjudication provisions of the Administrative Procedure Act and to extend certain fundamental fair hearing provisions to additional hearings required by statute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Administrative Adjudication in the 21st Century Act".

SEC. 2. DEFINITIONS.

- (a) Section 551 of title 5, United States Code, is amended--
 - (1) by striking "and" at the end of paragraph (13);
 - (2) by striking the period at the end of paragraph (14) and inserting "; and"; and
 - (3) by adding the following at the end:
 - "(15) 'Type A adjudication' means adjudication required by statute to be—
 - "(A) determined on the record after opportunity for an agency hearing; or
 - "(B) conducted in accordance with sections 556 and 557 of this title;
 - "(16) 'Type B adjudication' means an agency evidentiary proceeding required by statute, other than a Type A adjudication;
 - "(17) 'agency evidentiary proceeding' means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and
 - "(18) 'presiding officer' means the initial decisionmaker in a Type B adjudication."
- (b) Section 551(4) of title 5, United States Code, is amended to read as follows:
 - "(4) 'rule' means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;"

SEC. 3. TYPE A AND B ADJUDICATIONS.

Section 554 of title 5, United States Code, is amended—

(1) in subsection (a),

(A) by striking "adjudication required by statute to be determined on the record after opportunity for an agency hearing" in the matter preceding paragraph (1) and inserting "Type A adjudication and Type B adjudication";

(B) by inserting "or in a Type A or Type B adjudication" at the end of paragraph (1); and

(C) by striking paragraph (2) and redesignating paragraphs (3), (4), (5), and (6) as paragraphs (2), (3), (4), and (5), respectively;

(2) in subsection (b), by inserting "in a Type A or Type B adjudication" after "an agency hearing" in the matter preceding paragraph (1);

(3) in subsection (c),

(A) by inserting "In a Type A or Type B adjudication," at the beginning of the subsection; and

(B) by striking "on notice and in accordance with sections 556 and 557 of this title" and inserting "in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e)";

(4) in subsection (d),

(A) by designating the first sentence as paragraph (2) and by striking "he" in that sentence and inserting "he or she";

(B) by designating the second sentence as paragraph (3) and redesignating the existing paragraphs (1) and (2) in that sentence as subparagraphs (A) and (B), respectively;

(C) by designating the third and fourth sentences as paragraph (4) and, in the first sentence as so redesignated, by striking all after "agency in a" and inserting "Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision except as witness or counsel in public proceedings"; and

(D) by inserting the following at the beginning of the subsection:

"(1) A Type A adjudication shall be conducted in accordance with sections 556 and 557 of this title."; and

(5) by striking subsection (e) and inserting the following:

"(e)(1) A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.

"(2) A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(3) The functions of a presiding officer or an officer who reviews the decision of a presiding officer shall be conducted in an impartial manner.

"(4)(A) A presiding officer shall make the recommended or initial decision in the adjudication unless he or she becomes unavailable to the agency.

"(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult with any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

"(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

"(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

"(E) The requirements of this paragraph do not apply—

"(i) in determining applications for initial licenses;

"(ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(iii) to the agency or a member or members of the body comprising the agency.

"(5) The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.

"(6) The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

"(7) An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

"(f) Unless otherwise specified, after the date of enactment of this subsection, the establishment of an opportunity for hearing in an adjudication subject to the requirements of this section shall be deemed to provide for a Type A adjudication."

(g) Nothing in this section shall affect the requirements relating to agency or judicial review that are presently provided by statute.

SEC. 4. SUNSHINE ACT EXCEPTION.

Section 552b(c)(10) of title 5, United States Code, is amended by striking "formal agency adjudication pursuant to the procedures in section 554 of this title" and inserting "an agency evidentiary proceeding under section 554 of this title."

SEC. 5. DECLARATORY ORDERS.

Section 555 of title 5, United States Code, is amended by adding the following at the end:

"(f) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

SEC. 6. ISSUES RELATING TO EVIDENCE.

Section 556(d) of title 5, United States Code, is amended--

(1) by inserting "and may be entirely based on evidence that would be inadmissible in a civil trial" at the end of the third sentence; and

(2) by adding the following after the second sentence: "Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

SEC. 7. ALJ AND PO ETHICAL STANDARDS; REMOVAL AND DISCIPLINE OF PRESIDING OFFICERS.

(a) Title 5, United States Code, is amended by inserting after section 559 the following:

"§ 559a. Ethics and independence of Presiding Officers and Administrative Law Judges

"(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

"(b) The regulations shall be prescribed in accordance with section 553(b) and (c) of this title.

"§ 559b. Removal and discipline of presiding officers

"(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

"(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to the discipline or removal of a presiding officer."

(b) The analysis for chapter 5 of title 5, United States Code, is amended by inserting the following after the item relating to section 559:
"560a. Ethics and independence of Presiding Officers and Administrative Law Judges.
"560b. Removal and discipline of presiding officers."

SEC. 9. SUPERSEDING CONTRARY STATUTORY PROVISIONS.

The provisions of this act supersede existing contrary statutory provisions.

REPORT

Introduction

The Administrative Procedure Act of 1946 (APA)¹ controls the procedures of almost all federal government administrative agencies and it has achieved nearly constitutional status. The APA is of immense importance to the governmental process and to uncounted millions of people who are impacted by federal agencies. The APA regulates *all* federal agency rulemaking and *all* judicial review of agency action (with narrowly drawn exceptions in each case). Under the Freedom of Information Act,² an amendment to the APA passed in 1966, *all* federal government information is covered (again with specific exceptions). The Negotiated Rulemaking Act and the Administrative Dispute Resolution Act³ comprehensively regulate agency alternate dispute resolution.

As discussed in greater detail below, only a portion of agency adjudication is subject to the adjudication provisions of the APA. We call these "Type A adjudications." Type A adjudications are the cases in which administrative law judges (ALJs) ordinarily preside—primarily benefits cases involving Social Security, Medicare,⁴ and Black Lung. In addition, Type A adjudication covers a wide array of regulatory adjudication, such as that conducted by the FTC, NLRB, SEC, and FERC. Type A adjudication also covers a variety of other programs involving civil penalties, labor, transportation, and communication. The APA provides significant protections to litigants in Type A adjudication. These include detailed provisions relating to the merit selection, independence, compensation, freedom from performance evaluation, and tenure of ALJs.

Numerous statutes that call for evidentiary hearings as part of regulatory or benefit programs are not governed by the APA's adjudication provisions. We refer to these as "Type B adjudications." Presiding officers (POs) rather than ALJs conduct these hearings. We believe it would be in the public interest to extend certain APA provisions that prescribe fundamental norms of fair adjudicatory procedure to Type B adjudication. Although all presiding officers should, of course, be selected based on merit, competence and experience, we do not propose that the APA's specific provisions relating to the selection, compensation and tenure of ALJs be extended to POs in Type B adjudication since it is not practical to do so.

This resolution attempts to modernize the adjudication provisions of the APA by accomplishing the following goals.

1. Extend certain APA procedural protections to Type B adjudication (Part I of this Report).

¹ 5 U.S.C. §§51 et. seq. The APA is cited herein without the prefatory 5 U.S.C.

² APA §552.

³ 5 U.S.C. §§561 et. seq.; 571 et. seq.

⁴ The new prescription drug provision will undoubtedly increase the number of Medicare cases heard by ALJs. See Eleanor D. Kinney, *Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?* 29 Admin. & Regul. Law News 6 (Spring 2004) (transfer of ALJs deciding Medicare cases from Social Security to HHIS).

2. Require adoption of ethical standards for ALJs and POs and protect full-time POs against removal or discipline without cause. (Part II).
3. Clarify the definitions of rule and adjudication under the APA (Part III).
4. Clarify the circumstances in which newly adopted adjudication schemes will be Type A as opposed to Type B adjudication (Part IV).
5. Clarify the APA provisions relating to evidence (Part V).
6. Clarify the ability of all adjudicating agencies to issue declaratory orders.
7. Clarify the right to obtain transcripts at agency's cost of duplication (Part VI).
8. Clarify that legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions (Part VII).

I. Extending APA procedural protections to Type B adjudication

II.

The existing APA adjudication provisions cover only Type A adjudication. *The proposal discussed in this section of the report would not change Type A adjudication or alter the various provisions in the APA that safeguard ALJ independence.*⁵ We propose to extend certain procedural protections that are presently applicable to Type A adjudication to Type B adjudication.⁶

A. Type A adjudication under the APA

The term "Type A adjudication" covers all those hearing schemes to which the existing APA adjudicatory provisions apply.⁷ These proceedings, often referred to "formal adjudication," are ordinarily conducted by ALJs.⁸ They include hearings relating to Social Security, Medicare, and Black Lung benefits as well as to hearings provided by an array of regulatory agencies. There are approximately 1,350 federal ALJs.

In general, Type A adjudications are presently identified by statutes (outside the APA) that either i) explicitly require that sections 556-557 of APA apply or ii) call for adjudication "required by statute to be determined *on the record* after opportunity for an agency hearing."⁹ As discussed in Part IV, the phrase "on the record" has acquired talismanic properties and most cases hold that those very words (or other clear evidence of Congressional intent) must be used

⁵ The proposals discussed in Parts II to VII apply to Type A adjudication but do not involve fundamental changes.

⁶ These recommendations relate only to "adjudication" which, as discussed in part III below, means action of *particular* rather than *general* applicability. Thus, proceedings for ratemaking for an entire industry, like those in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), would be treated as rulemaking, not adjudication, and would not be treated as Type B adjudication.

⁷ APA §§554, 556-58. See proposed §551(15) defining "Type A adjudication."

⁸ Type A adjudication includes some relatively rare situations in which ALJs do not preside. First, a statute may provide that APA §§556-57 apply except that ALJs do not preside. APA §556(b). See Michael Asimow, editor, *A Guide to Federal Agency Adjudication* ¶10.03 (ABA Section of Administrative Law and Regulatory Practice, 2003) (hereinafter referred to as *Guidebook*). Second, the APA allows the agency head or heads to preside instead of ALJs, although this rarely if ever occurs. Third, in initial licensing or ratemaking cases, the APA allows the agency to designate staff members other than ALJs as presiding officers. §556(b). Type A adjudication covers hearings and procedures described in this footnote even though in fact ALJs do not preside.

⁹ APA §554(a) (emphasis added). See *Guidebook* ¶3.01. Under the proposed default provision discussed in part IV below, adjudicatory hearings called for in future statutes will be Type A adjudication (even if the statute does not use the magic words "on the record") unless Congress provides the contrary.

before Type A adjudication provisions come into play. Other than the changes described in Parts II to VII of this Report, which are not fundamental in nature, we propose *no changes* in Type A adjudication since we view the system of Type A adjudication as working well.

B. Type B adjudication and informal adjudication

The recommendation proposes extension of certain fundamental procedural protections set forth in the existing APA to “Type B adjudication,” meaning evidentiary proceedings required by statute other than Type A adjudication.¹⁰ Type B adjudication covers a wide range of evidentiary proceedings that are conducted by presiding officers (POs) who are not ALJs.¹¹

Although people sometimes refer to Type B adjudication as “informal adjudication,” this usage is not proper. Many Type B hearings are as “formal” or even more “formal” than Type A hearings.¹² The term “informal adjudication” is properly used to describe the vast array of adjudications conducted by federal agencies with respect to which no statute requires a hearing.¹³ There are literally millions of informal adjudications, ranging from economically important orders (such as refusal to grant a bank charter) to low-stakes decisions (such as allocation of campsites by federal forest rangers). Our proposals do not affect informal adjudication as defined in this paragraph.

C. Rationale

The provisions in Title V of the U. S. Code relating to rulemaking, judicial review, alternative dispute resolution, and government information apply across the board, but the APA’s provisions for adjudication apply only to a portion of federal agency evidentiary proceedings.¹⁴ This unfortunate balkanization of hearing procedures defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to provide basic fair-hearing norms in most agency adjudication.¹⁵

A 1992 study by ALJ John H. Frye III (based on 1989 data) identified about 83 case-types (involving about 343,000 cases annually) of Type B adjudication.¹⁶ Frye identified 2,692

¹⁰ See proposed APA §§551(16) and (17).

¹¹ In practice, numerous titles are used to describe POs, but we used the generic term PO to include all such presiders. See proposed APA §551(18).

¹² Most Type A hearings are Social Security cases which are conducted in a non-adversarial, relatively informal fashion.

¹³ The term “informal adjudication” is sometimes used to describe Type B proceedings that are conducted informally but we believe that the term “informal adjudication” should be reserved for the vast array of adjudicatory proceedings as to which no statute requires an evidentiary hearing.

¹⁴ APA §§555 and 558 apply to all adjudications but provide protections that fall far short of those provided in Type A adjudication or the protections we propose should be applicable to Type B adjudication. See *Guidebook* ¶¶9.04, 9.06.

¹⁵ Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Flailing?* 10 Admin. L. J. 65 (1996); Cooley R. Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 Admin. L. Rev. – (2004); Attorney General’s Manual on the APA 9 (1947).

¹⁶ John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 264 (1992). Frye eliminated 46 case types that showed a caseload of less than one case per year. See also Paul Verkuil et. al., *The Federal Administrative Judiciary*, Vol. 2 [1992] ACUS Rec. & Rep. 779, 788-90, 843-73. In

POs. Of the 83 case-types, 15 accounted for 98% of the total. The largest Type B category is deportation cases. There are a substantial number of law enforcement cases, including civil penalties administered by numerous agencies,¹⁷ as well as passport denials or security clearance disputes. Type B adjudication includes many benefit cases such as veterans' benefits and Medicare Part B cases decided by employees of insurance carriers. A substantial number of cases deal with economic matters (farm credit, public contract disputes, bid protests, or debarment of contractors) and federal employment relationships (such as those administered by the Merit Systems Protection Board).

In 2002, Raymond Limon updated Frye's study.¹⁸ Limon found 3,370 Type B POs, about a 25% increase from 1989 figures. In contrast, there are 1,351 ALJs in 29 different agencies (a 15% increase).¹⁹ Frye reported 393,800 Type B proceedings each year; Limon reported 556,000 (a 41% increase).²⁰

POs may be full-time decisionmakers or may be agency staff members who engage in part-time judging along with other tasks.²¹ Frye found that full-time POs decide about 90% of the Type B cases (but part-time POs decided cases in 34 of the 83 case-types, mostly the less active ones).²² Most of the full-time POs are lawyers but most of the part-time POs are not lawyers.²³

Based on the criteria set forth in Part IV, it would be desirable to convert many of the existing systems of Type B adjudication to Type A adjudication. However, it is unlikely that Congress will be persuaded to do so in the foreseeable future. Thus, our proposal recognizes that

comparison to the 343,000 Type B adjudications, the ACUS study estimated that there were about 300,000 Type A adjudications per year in the late 1980's.

¹⁷ Under the Clean Water Act, EPA can impose a "class 1 civil penalty" (\$10,000 per violation up to \$25,000 maximum) or a "class 2 civil penalty" (\$10,000 per violation with a maximum of \$125,000). A class 2 penalty must follow "notice and opportunity for a hearing on the record in accordance with section 554 of Title 5." A class 1 penalty also requires notice and a hearing but "such hearing shall not be subject to section 554 and 556 of Title 5 but shall provide a reasonable opportunity to be heard and present evidence." 33 U.S.C.A. §1319(g)(2). Thus Class 2 penalties call for Type A adjudication but Class 1 penalties call for Type B adjudication. For a thorough treatment of civil penalties and Type B adjudication, see William F. Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Civil Penalties*, 24 Seton Hall L. R. 1 (1993).

¹⁸ Office of Administrative Law Judges, *The Federal Administrative Judiciary Then and Now—A Decade of Change 1992-2002* (Dec. 23, 2002).

¹⁹ Limon stated that in 1992 there were 1167 ALJs; in 2002, there were 1351 ALJs. Limon 3, n.4. During much of the period between the Frye and Limon reports, the hiring of ALJs was frozen. But for the freeze, the number of ALJs would undoubtedly have expanded more rapidly.

²⁰ Numerous recent statutes call for Type B adjudication. For example, a recently enacted statute provides for "collection due process" (CDP) hearings by the IRS. IRC §§6320, 6330. The IRS now conducts about 30,000 CDP hearings annually and the number is rising steadily. CDP hearings appear to be Type B adjudication although numerous issues about the nature of CDP hearings and judicial review thereof are at present unresolved. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Florida L. Rev. 1, 117-28 (2004); Leslie Book, *The Collection Due Process Rights: A Misstep or Step in the Right Direction*, 41 Houston L. Rev. (2004).

²¹ Some part-time POs are not agency staff members; they may be retired judges or academics who are called upon by the agency from time to time as their particular expertise is needed.

²² Frye found that there were 601 full-time POs and 2130 part-time POs. However, full-time POs decided about 90% of the Type B cases. Frye 349-50.

²³ Frye 349. Limon found that of 3370 POs, only 1370 were lawyers. However, of the 601 full-time POs, 438 were lawyers.

second-best is better than nothing at all. It is intended to insure fundamental, baseline procedural protection in the large universe of Type B adjudication.²⁴ In practice, so far as we can determine, such protections are normally provided in existing Type B adjudication schemes. Nevertheless the public deserves to be guaranteed that such protections will always be provided through generally applicable and accessible APA provisions, instead of the existing maze of due process requirements and situation-specific statutes and procedural regulations.

D. Meaning of “evidentiary proceeding”

Our proposal recognizes and distinguishes three types of federal adjudication. Type A adjudication refers to the set of evidentiary hearings usually conducted by ALJs and is unaffected by our proposal.²⁵ Type B adjudication refers to evidentiary hearings required by statute that are conducted by POs. Our proposal would impose a set of procedural requirements on Type B adjudication. Informal adjudication entails decisions by federal agencies with respect to which no statute calls for a hearing. Our proposal does not affect informal adjudication (except to make clear that it is possible to issue a declaratory order through informal adjudication—see Part VI).

As discussed in Part IV, there is considerable case law that distinguishes Type A from Type B adjudication. Unfortunately, this case law is in conflict. Our proposal does not attempt to resolve this conflict but assumes that the line between Type A and Type B would continue to be drawn under existing law. (Part IV of our proposal would clarify the Type A/Type B distinction for statutes adopted in the future). We discuss here the problem of distinguishing Type B adjudication from informal adjudication.

Type B adjudication, as defined in proposed §551(16), means “an agency evidentiary proceeding required by statute, other than Type A adjudication.”²⁶ Under proposed §551(17), the term “agency evidentiary proceeding” means “a proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing.” As provided in new §551(18), a “presiding officer” conducts Type B adjudication. Thus a Type B proceeding will

²⁴ New provisions in California’s APA that were enacted in 1995 call for a scheme similar to this proposal. The California statute preserved a system of Type A adjudication that relies on central panel ALJs. It then provides for an “administrative adjudication bill of rights” for Type B adjudication. See generally Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 *Tulsa L. J.* 297 (1996).

²⁵ See note 16 which observes that a few classes of Type A adjudication are not heard by ALJs.

²⁶ The definition excludes from Type B adjudication the types of cases already excepted from Type A adjudication by §554(a) with some modifications: (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a Type A or Type B adjudication; (2) proceedings in which decisions rest solely on inspections, tests, or elections; (3) the conduct of military or foreign affairs functions; (4) cases in which an agency is acting as an agent for a court; or (5) the certification of worker representatives.

We strike out an existing exemption: “(2) the selection or tenure of an employee other than an ALJ.” Hearings required by statute that concern the tenure of government employees would normally be classified as Type B adjudication. If any statute provides for evidentiary hearings relating to selection of employees, these would generally be Type B hearings also. Hearings relating to the tenure of ALJs would continue to be Type A adjudication. We propose that disputes concerning the tenure of Type B POs should also be Type A adjudication. We propose to strike out the existing exemption because hearings relating to selection and tenure of federal employees should be included in the APA’s provisions for Type A or B adjudication. See Part II.

always be identified by the presence of a federal statute (other than the APA) that calls for an evidentiary proceeding.

Federal statutes frequently call for evidentiary “hearings” that are not Type A adjudication. The definition of Type B adjudication captures these proceedings.²⁷ Some statutes use terms other than “hearing” to describe such proceedings but the intention of the statute is to call for an “evidentiary proceeding.”²⁸ The term “evidentiary proceeding” covers hearings required by statute even if all of the evidence is submitted in writing rather than orally, so long as the decisionmaker is limited to considering only record evidence. The term includes non-adversarial, inquisitorial hearings in which the Government is not represented, such as the hearings conducted by the Board of Veterans’ Appeals (just as Type A adjudication includes non-adversarial Social Security hearings).²⁹

The term “evidentiary proceeding” does *not* include statutory provisions calling for notice and comment-type procedures (even if applicable to adjudication) where such procedures do not limit the decisionmaker to consideration only of the evidence in the record.³⁰ Nor does it include so-called “hearings” in which the public is invited to appear and make statements (such as often occurs with respect to various forms of land use decisions),³¹ informal inquiries, or investigatory or settlement-oriented hearings (meaning hearings that can be followed by another de novo administrative review or de novo judicial review to finally resolve the matter).³²

²⁷ For example, in railroad unemployment insurance cases, an employee “shall be granted an opportunity for a hearing before a referee.” 35 USC §355. A federal government employee claiming workers compensation “is entitled to a hearing on his claim before a representative of the Secretary.” 5 USC §8124(b)(1). In Agriculture Department disputes, there is a “right to appeal an adverse decision for an evidentiary hearing of a hearing officer.” 7 USC §6996(a). Persons who are subject to IRS collection activities have “a right to a hearing.” IRC §6330(a)(1).
²⁸ In immigration cases, the statute states that an Immigration Judge (IJ) “shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien “shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government.” The IJ is authorized to administer oaths, receive evidence, and issue subpoenas; the IJ must rule on evidentiary objections and provide findings and reasons for decisions. 8 USC §1229a(l)(a)(1), (b)(1), (4)(B); 8 CFR §240.1(c). The Contract Disputes Act provides that a board of contract appeals shall “provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing.” A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended. 41 USC §§607(e), 610. We understand that the existing system of public contract dispute resolution already meets all requirements of Type B adjudication.
²⁹ 38 USC §§7104(a), 7107(b). BVA hearings are informal and non-adversarial. See 38 CFR §20.700(c).

³⁰ See 16 USC §1456(c)(3)(A) concerning licensing decisions for activities within the coastal zone. The Secretary of Commerce can override a state’s objection to the issuance of a federal license or permit after finding the activity consistent with goals and objectives of the Coastal Zone Management Act or necessary in the interests of national security. The Secretary must first provide an opportunity for the state and permit applicant to submit detailed comments. Though the regulations implementing this provision establish detailed appellate-like procedures for the conduct of the Secretary’s inquiry, the statute indicates no requirement for an evidentiary proceeding as the Secretary is not limited to considering only the data contained in the written comments submitted by the parties.

³¹ See, e.g., *Buttrely v. United States*, 690 F.2d 1170, 1174-83 (5th Cir. 1982) (“opportunity for public hearing” does not trigger APA formal adjudication).

³² Present section 554(a)(1) contains an exception for “a matter subject to a subsequent trial of the law and the facts de novo in a court.” We propose to add the words “or in a type A or Type B adjudication.” We intend thereby to make clear that the requirements for Type B adjudication will not apply where a “hearing” required by statute can be followed by another de novo trial of the law and facts, whether it takes place in an Article III court or before some administrative tribunal or Article I court. In short, a litigant gets only one Type B or Type A administrative proceeding, not two. (For this purpose, we do not consider the remote likelihood that the agency heads or other

It would be possible to extend Type B adjudication to evidentiary proceedings called for by the Due Process clause of the 5th Amendment. We do not propose this because it would be difficult to decide which due process cases call for evidentiary proceedings and which ones call for some sort of interaction that is less formal than an evidentiary proceeding.³³ Due process cases use an ad hoc balancing test to decide what procedures are applicable³⁴ and thus resist the sort of rigidity that the proposed statutory test would entail.

It would also be possible to extend the Type B adjudication concept to evidentiary proceedings called for by *agency procedural regulations* rather than by statutes.³⁵ We do not propose this, however, because it would create perverse incentives. It might discourage agencies from voluntarily adopting hearing procedures through their regulations when they are not required to do so. Also, it might encourage agencies to dispense with hearing procedures now called for by regulations. Agencies should not be discouraged from providing procedural protections that they are not required to provide.³⁶

E. APA provisions applicable to Type B adjudication

Under proposed APA §554(c), certain provisions of the existing APA will apply to Type B adjudication:

- Timely notice and right to submit settlement offers;³⁷
- The right to present a case by oral or documentary evidence and to conduct cross examination when required for a full and true disclosure of the facts;³⁸

reviewing authority can call for a de novo hearing after the decision of an ALJ or a PO as constituting a subsequent de novo trial).

³³ See, e.g., *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (procedures required before public employee is discharged); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedures required before suspending child from school for ten days or less).

³⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

³⁵ The VA regulations (but not a statute) provide for a hearing in connection with benefits disputes (so-called "regional office hearings"). 38 CFR §3.103(c). Such hearings are not Type B adjudication for two reasons: i) they are provided for in regulations rather than by statute, and ii) they are followed by a subsequent de novo administrative hearing provided by the Board of Veterans' Appeals. Similarly, the Equal Employment Opportunities Commission provides hearings for federal employees who allege prohibited discrimination but such hearings are authorized by regulation rather than by statute. See 42 U.S.C. §2000e-16(b); 29 CFR §1614.109(a) (2003).

³⁶ Of course, agencies might choose to incorporate the principles applicable to Type B adjudication in their procedural regulations calling for evidentiary proceedings. It seems likely that many would choose to do so (or have already done so).

³⁷ Proposed APA §554 (b) and (c) apply the existing APA provisions for notice and submission of settlement proposals to Type B proceedings. See *Guidebook* §4.02.

³⁸ Proposed APA §554(e)(2) adapts language from APA §556(d): "A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts." See *Guidebook* §5.07, 5.08. As in Type A adjudication, a PO would have discretion as to whether evidence should be presented orally or in writing. Similarly, a PO would have discretion whether to allow cross-examination. A PO may decide that cross-examination is not needed for a "full and true disclosure of the facts" where the issue to be resolved is not a disputed factual question that turns on credibility. As in Type A adjudication, a PO may decide that evidence that has been received in written form need not be subject to cross-examination.

Under VA regulations, no cross-examination is allowed in BVA hearings. However, the parties (presumably including the PO) may ask "follow-up questions" of the witnesses. 38 CFR §20.700(c) ("Parties to the

- Decisionmaker impartiality;³⁹
- Decisionmaker independence and separation of functions;⁴⁰
- Prohibition on ex parte contacts with decisionmakers;⁴¹
- The exclusive record and official notice provisions;⁴² and
- the requirement of a written or oral decision containing findings and reasons. In the event that the POs decision is reviewed at a higher agency level, the POs decision must be disclosed to the parties who have an opportunity to comment on it prior to the higher-level decision.⁴³

It is intended that the provisions for notice and hearing, decisionmaker independence, and written or oral decisions, would apply only to the initial proceeding.⁴⁴ The requirements of impartiality, separation of functions, ex parte contact, and exclusive record would apply both to the initial decision stage and to the agency review stage. We also believe that the exception from the Government in the Sunshine Act that applies to the “initiation, conduct, or disposition” of Type A adjudication should be extended to include Type B adjudication.⁴⁵

hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted”). Because of the non-adversarial format of BVA hearings (meaning that the VA is not represented), there may be little occasion for cross-examination. The provision for follow-up questions should be sufficient to meet the requirements of proposed §554(e)(1). Similarly, IRS collection due process (CDP) hearings do not include cross-examination. Reg. §301.6330-1(d)(1) A-D6 (“the taxpayer or the taxpayer’s representative do not have the right to subpoena and examine witnesses at a CDP hearing”). The issues in a CDP hearing would not ordinarily involve credibility conflicts so cross-examination should not be necessary.

³⁹ Proposed APA §554(e)(3) adapts language drawn from §556(b): “The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.” See *Guidebook* ¶7.02.

⁴⁰ Proposed §554(e)(4)(A) provides that a PO shall make the recommended or initial decision unless he or she becomes unavailable. This parallels existing §554(d). Proposed §554(e)(4)(B) provides that a PO shall not consult any person or party ex parte on a fact in issue. This parallels existing §554(d)(1). Proposed §554(e)(4)(C) prohibits command influence. It parallels existing §554(d)(2). The proposed command influence provision applies only to full-time POs. It would be impracticable to prohibit command influence in the case of part-time POs who engage in investigation or prosecution functions in other cases and are supervised by staff members who engage in such functions. Instead, we propose that a part-time PO not be supervised by a person serving as prosecutor or investigator in the same adjudication that the PO is deciding. We seek to avoid extra costs or disruption of existing structures, and we do not wish to compel agencies to reorganize themselves. Finally, §554(e)(4)(D) parallels the existing provision for separation of functions; it prohibits agency prosecutors or investigators in a case from participating or advising in the decision of that case. See *Guidebook* ¶7.06.

⁴¹ Proposed APA §554(e)(5) incorporates the provisions of existing APA §557(d). See *Guidebook* ¶7.04.

⁴² Proposed APA §554(e)(5) also incorporates APA §556(e): “The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.” See *Guidebook* ¶7.08.

⁴³ Proposed APA §554(e)(6) requires a PO’s decision to include

“a statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the” PO. This provision modifies language in existing APA §557(c). See *Guidebook* ¶6.02. We understand that some POs deliver oral decisions. We did not wish to compel a change in this practice by requiring written decisions. We also understand that in some Type B proceedings, POs write recommended decisions that are not disclosed to the parties until after the agency review phase is completed. Our proposal would change this practice.

⁴⁴ Normally the initial proceeding would be conducted by a PO but these requirements should also apply if the initial proceeding is conducted by the agency heads or other officials.

⁴⁵ 5 USC §552b(c)(10).

Numerous provisions of the existing APA will *not* apply to Type B adjudication unless required by statute (or by agency rule). These include:

- The various provisions relating to the hiring, compensation, rotation, evaluation and discharge applicable to ALJs.⁴⁶
- Provisions relating to evidence and burden of proof.⁴⁷
- Various provisions relating to review of initial decisions.⁴⁸
- The right to an award of attorney's fees under the Equal Access to Justice Act.⁴⁹

Judge Frye's report confirms that Type B adjudication is already conducted in accordance with the requirements of proposed section 554(e) in almost all cases. Therefore, the adoption of these baseline procedural protections should not significantly change the way that federal agencies conduct Type B adjudication. These provisions will not increase the costs of conducting Type B adjudication or cause delays or confusion or require costly agency reorganizations. Our intention is to assure that litigants will receive fundamental procedural protections in Type B adjudication without requiring restructuring of existing hearing schemes.

II. Ethical standards and protection against reprisal

Proposed §559a requires the Office of Government Ethics to adopt ethical standards for all federal ALJs and POs. This proposal implements Resolution 101B, adopted August 6, 2001, in which the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA's Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.

The objective of Resolution 101B, and of proposed §559a, is to assure that both ALJs and POs be held accountable to appropriate ethical standards. These rules should be based on the ABA Model Code of Judicial Conduct as a starting point, taking account of the unique characteristics of particular positions of ALJs and POs. The rules should also consider the codes of ethics adopted by groups such as NCALJ and the 1989 Code of Conduct for Administrative Law Judges, and might include particular standards adapted to the unique characteristics of various positions held by ALJs and POs, for part-time and full-time POs, or for lawyers and non-lawyers.⁵⁰

⁴⁶ 5 U.S.C. §§3105, 7521, 5372, 3344, 1305. See *Guidebook* Chapter 10.

⁴⁷ §556(d). See *Guidebook* ¶5.03 to 5.05. In our view, it is not necessary to incorporate the APAs provisions relating to evidence and burden of proof in order to insure fair procedure in Type B adjudication. In particular, we did not wish to impose the *Greenwich Collieries* decision on agencies conducting Type B adjudication unless they choose to adopt it. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Guidebook* ¶5.053.

⁴⁸ APA §§557(b), (c). See *Guidebook* ¶6.03. Again, we did not believe it necessary to incorporate these detailed provisions to achieve fair procedures in Type B adjudication.

⁴⁹ See *Guidebook*, chapter 11. We would not be opposed to extending EAJA to Type B adjudication but do not recommend it at this time in the interests of minimizing the budgetary impact of our proposal.

⁵⁰ The ABA's Model Code of Judicial Conduct stresses that "anyone, whether or not a lawyer, who is an officer of a judicial system and performs judicial functions...is a judge within the meaning of this Code."

Also in keeping with Resolution 101B, proposed section 559b provides that full-time POs shall be removed or disciplined only for good cause and only after a hearing to be provided by MSPB under the standards of Type A adjudication, subject to judicial review.⁵¹ Section 559b is also based on ABA Resolution 101B.⁵² POs should be protected from negative consequences for engaging in ethical and independent decisionmaking. Good cause should include violation of the ethical rules referred to in the preceding paragraph. POs should also be entitled to judicial review of such decisions.

III. Clarifying the definition of rule

At present, the APA's definition of "rule" is defective.⁵³ Rulemaking is the process for formulating a "rule." A "rule" is a "statement of *general or particular applicability and future effect* designed to implement, interpret or prescribe law or policy...and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Adjudication is the process for formulating an "order" and an "order" means a "final disposition . . . in a matter *other than rule making* but including licensing."⁵⁴

The statute should be amended so that agency action of *general applicability* is a rule and agency application of *particular applicability* is adjudication.⁵⁵ Under the existing definitions, for example, an FTC cease and desist order would be a rule (since it is agency action of particular applicability and future effect), but everyone treats cease and desist orders as "orders" rather than as "rules" and agrees that they should be subject to adjudicatory procedure.⁵⁶ This

⁵¹ As provided in Recommendation IV, newly enacted hearing schemes should be Type A rather than Type B adjudication unless Congress specifically provides to the contrary. Consistent with the spirit of Recommendation IV, we recommend here that adjudication arising out of the discipline or discharge of POs should be Type A adjudication, meaning that such cases would be heard by the MSPB's ALJs rather than its POs. Of course, the same exceptions presently applicable to hearings to remove ALJs (relating to national security or to reductions in force) would also apply to removal of POs. 5 USC §7521(b)(A) and (B), referring to §7532 and §5502. A full-time PO would be treated as such even if the official had limited incidental duties in addition to judicial responsibilities in evidentiary hearings.

⁵² The 2001 resolution made clear that, for this purpose, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

⁵³ See *Guidebook* ¶1.04; Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. — (2004).

⁵⁴ APA §§551(4) to (7).

⁵⁵ The recommendation also deletes the words "and includes the approval or prescription for the future of rates, wages, corporate or financial structure or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." The effect of the latter change is that ratemaking of general applicability would be rulemaking but ratemaking of particular applicability would be adjudication. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) (holding that setting of industry-wide railway rate should be treated as informal rulemaking under the APA).

⁵⁶ As under existing law, a rule that in practice would apply to only a single person is still a rule (rather than an adjudication) as long as it is stated in general terms and it is theoretically possible that it could apply to additional persons. An agency's grant of exemption from a rule to a particular person would be an adjudication.

proposal is already ABA policy. It was part of a set of recommendations approved in 1970 by the HOD.

A further clarifying amendment removes the words “and future effect” from the definition of “rule.” This revision would make clear that the APA applies to retroactive rules. Under Supreme Court case law,⁵⁷ an agency may not adopt a retroactive rule that has the force of law unless Congress explicitly authorizes the agency to do so. When agencies do adopt retroactive rules with the force of law, they should be adopted with appropriate notice and comment procedures.⁵⁸ In addition, interpretive rules often have retroactive effect; the APA’s definition of “rule” should also cover retroactive interpretive rules.

IV. Type A Adjudication: Guidelines for Congress and a Default Provision When Statute is Unclear

In June, 2000, the ABA House of Delegates adopted Resolution 113, a recommendation sponsored by the Judicial Division, that set forth criteria Congress should consider in deciding whether a new adjudicatory scheme should employ Type A adjudication. A second part of the resolution created a default provision that would sweep newly adopted adjudicatory schemes into Type A unless Congress provided otherwise. This 2000 resolution is germane to the present set of recommendations. If Congress takes up the issues of Type A and B adjudication, it would naturally consider this recommendation at the same time.⁵⁹

A. Criteria for deciding whether new program should employ Type A adjudication

When Congress sets up a new program involving adjudications with opportunity for hearing, it should consider and explicitly determine whether the new program will be Type A adjudication.

Congress should consider the following factors (each of which points toward Type A rather than Type B adjudication):

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.

b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

⁵⁷ *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). We do not propose to change the rule of the *Georgetown* case but only to provide that the APA’s definition of rule applies when an agency is authorized to adopt a retroactive rule or when it adopts a retroactive interpretive rule.

⁵⁸ See ABA House of Delegates Resolution (Feb. 1992) stating that “retroactive rules are and should be subject to the notice and comment requirements of Section 553 of the Administrative Procedure Act.”

⁵⁹ Because of the various changes in statutory nomenclature embodied in this recommendation and report (such as adoption of the terms Type A and B adjudication), we propose non-substantive changes in the 2000 recommendation.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.⁶⁰

B. Default provision

Congress should amend the APA to provide prospectively that absent a statutory requirement to the contrary, in any future legislation that creates opportunity for an adjudicatory evidentiary hearing, such hearing shall be Type A adjudication.⁶¹

C. Rationale

Under the existing APA, Type A adjudication exists only when “adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing...”⁶² Where a statute calls for an evidentiary hearing but does not use the magic words “on the record,” it has been difficult to decide whether the resulting adjudication is Type A or Type B. The case law is conflicting.⁶³ ABA Resolution 113, already adopted by the HOD, calls for Congress to carefully consider this issue when it adopts future legislation that creates opportunity for an adjudicatory evidentiary hearing. The Resolution provides a useful list of factors that Congress should consider when it makes that decision. The resolution also calls for a prospective-only default rule. Under that rule, future legislation that creates opportunity for an adjudicatory evidentiary hearing will require Type A adjudication unless Congress provides the contrary.

This default rule will nudge federal administrative law in the direction of greater use of ALJs and Type A adjudication. This will result in enhancement in the impartiality and skill of adjudicatory decisionmakers and an accompanying improvement in the fairness and quality of decisions. Generally, agencies are well aware of legislation that affects them and the burden should be on the agencies to inform Congress at the time it considers a new adjudicatory scheme if the agency believes that Type A is inappropriate.⁶⁴

⁶⁰ These factors are substantially the same as those in ACUS Recommendation 92-7, 57 Fed. Reg. 61760 (Dec. 29, 1992).

⁶¹ Resolution 113 states that such hearings “shall be subject to 5 USC §§554, 556, and 557.” The present Recommendation used the term Type A adjudication which embodies the sections of the APA referred to in Resolution 113. No change in meaning is intended.

⁶² APA §554(a).

⁶³ See *Guidebook* ¶3.01; Gary Edles, “An APA-Default Presumption for Administrative Hearings: Some Thoughts on ‘Ossifying’ the Adjudication Process,” 55 Admin. L. Rev. 787, 796-804 (2003); Cooley R. Howarth, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?* 37 Admin. L. Rev. 317 (1985); Cooley R. Howarth, *Restoring the Applicability of the APA’s Adjudicatory Procedures*, 56 Admin. L. Rev. – (2004). Three distinct lines of cases have emerged. Some cases conclude that Type A adjudication is intended despite absence of the words “on the record.” *Steadman v. SEC*, 450 U.S. 91, 96 n.13 (1981); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 875-78 (1st Cir. 1978); *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997). Other cases require the use of the words “on the record” or some other clear statement of Congressional intention. *City of West Chicago v. NRC*, 701 F.2d 632, 644-45 (7th Cir. 1983); *RR Comm’n of Texas v. United States*, 765 F.2d 221, 227-29 (D.C. Cir. 1985). And still others accord *Chevron* deference to the agency’s determination that the statute does not call for Type A adjudication. *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989).

⁶⁴ According to the Report accompanying Resolution 113, the default rule would apply to “any new adjudication that Congress creates with an opportunity for a hearing.” See Edles, 812-14.

V. Issues relating to evidence

A. Residuum rule

The “residuum rule” (followed in some states) requires that a decision must be supported by at least some non-hearsay evidence. This rule creates many problems, such as requiring the judge to make constant hair-splitting rulings about hearsay and its many exceptions, and requiring the parties to object at some appropriate time that the residuum rule applies in order to preserve the issue on appeal. It is generally believed that *Richardson v. Perales*⁶⁵ rejected the residuum rule at the federal level but this should be made clear in the statute.

The proposed amendment to APA section 556(d) accomplishes this result by adding the italicized language: “A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, *and may be entirely based on evidence that would be inadmissible in a civil trial.*”

B. Evidence—FRE 403

In general, the Federal Rules of Evidence are not applicable to administrative agencies. The existing APA provides that an agency “as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”⁶⁶ An ACUS study indicated that this provision was inadequate because it did not give ALJs adequate case management tools. The consultant’s survey of ALJs indicated that they believed they lacked power to exclude evidence that was patently unreliable or whose probative value was so low that it would not justify the amount of hearing time it would require.

The ACUS study declared: “This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state. Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications.”⁶⁷

As a result, ACUS recommended that agencies adopt evidentiary rules allowing decisionmakers to exclude evidence under Federal Rule of Evidence 403.⁶⁸ That rule provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”⁶⁹ We agree and recommend that section 556(d) of the APA be amended to specifically permit ALJs to exclude evidence based on the FRE 403 standard (as modified slightly to take account of the differences between administrative and judicial proceedings).

⁶⁵ 402 U.S. 389 (1971).

⁶⁶ APA §556(d).

⁶⁷ Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 23 (1987).

⁶⁸ ACUS Recommendation 86-2, 51 Fed. Reg. 25642 (July 16, 1986).

⁶⁹ The elision in this quotation is for the words “or misleading the jury” and “danger of unfair prejudice,” which seem inapplicable to the administrative process.

VI. Declaratory orders

Existing §554(e) empowers an agency to issue a declaratory order to terminate a controversy or remove uncertainty. The placement of this subsection in the existing statute implies that only an agency authorized to conduct Type A adjudication can issue a declaratory order. We believe that any agency, whether conducting Type A, Type B, or informal adjudication, should be authorized to issue a declaratory order. Therefore, we propose moving this provision to §555, which applies to agency proceedings generally.⁷⁰

VII. Transcripts

The APA should provide that transcripts of agency proceedings (if they exist) should be available to private parties at cost of duplication. This is probably already required by §11 of the Federal Advisory Committee Act which provides: "Except where prohibited by contractual agreements entered into prior to the effective date of this act, agencies shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings (as defined in §551(12))." It would be useful to incorporate this provision in the APA itself where it would not be overlooked. As a result, we recommend that section 556(e) be amended by adding the italicized language and deleting the stricken out language:

~~"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and on payment of lawfully prescribed costs, shall be made available to the parties. Agencies shall make such transcripts available to the parties at the actual cost of duplication. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.~~

VIII. Superseding contrary statutory provisions

Legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions.

Respectfully submitted,
 Randolph J. May
 Chair, Section of Administrative Law and
 Regulatory Practice

February 2005

⁷⁰ See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. – (2004).

APPENDIX
(Ramseyer Rule)

I. Extending APA procedural protections to Type B adjudication

A. Definitions

Add to APA § 551 (definitions), 5 U.S.C. § 551:⁷¹

- (15) "Type A" adjudication means adjudication required by statute to be—
 (A) determined on the record after opportunity for an agency hearing; or
 (B) conducted in accordance with sections 556 and 557 of this title;
- (16) "Type B adjudication" means an agency evidentiary proceeding required by statute, other than a Type A adjudication;⁷²
- (17) "agency evidentiary proceeding" means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and
- (18) "presiding officer" means the initial decisionmaker in a Type B adjudication.

B. Type B adjudication

Amend existing APA § 554 so that it reads as follows:

Sec. 554. - Adjudications

(a) *General principles.* This section applies, according to the provisions thereof, in every case of *Type A adjudication and Type B adjudication* ~~adjudication required by statute to be determined on the record after opportunity for an agency hearing,~~ except to the extent that there is involved—

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court *or in a Type A or Type B adjudication*;⁷³
- (2) ~~the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;~~⁷⁴
- (2) proceedings in which decisions rest solely on inspections, tests, or elections;

⁷¹ Subsequent references to the APA will exclude the prefatory 5 U.S.C.

⁷² The problem of distinguishing Type A, Type B, and informal adjudication is discussed in Parts I.A. and I.B. of the Report that follows these recommendations.

⁷³ In some agencies, the agency heads or a superior reviewing authority can, in theory, require a new de novo hearing of a case already heard by an ALJ or a PO to be conducted before the agency heads. We understand that this virtually never occurs in practice. The unlikely possibility of a de novo rehearing at the agency head level should not be taken into account in applying this subsection. Thus the rules relating to Type A and Type B adjudication apply to the hearing provided by an ALJ or a PO despite the remote possibility that the case could be heard anew at a higher level. For further discussion, see note 32 of the Report.

⁷⁴ This exception in the existing act becomes inappropriate in light of the adoption of the provisions relating to Type B adjudication. For further discussion, see note 26 of the Report.

- (3) the conduct of military or foreign affairs functions;
- (4) cases in which an agency is acting as an agent for a court; or
- (5) the certification of worker representatives.

(b) *Notice.* Persons entitled to notice of an agency hearing in a *Type A* or *Type B* adjudication shall be timely informed of —

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted. ... [balance of subsection remains the same]

(c) *Settlement proposals.* In a *Type A* or *Type B* adjudication, the agency shall give all interested parties opportunity for —

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title, in accordance with the procedures for *Type A* adjudication specified in subsection (d) or *Type B* adjudication specified in subsection (e).

(d) *Procedures for Type A adjudication.*

- (1) *A Type A adjudication shall be conducted pursuant to sections 556 and 557 of this title.*
- (2) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he or she becomes unavailable to the agency.
- (3) Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
 - (A) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
 - (B) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
- (4) ~~An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision, decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —~~
 - (A) in determining applications for initial licenses;
 - (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
 - (C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.⁷⁵

(e) Procedures for Type B adjudication.

(1) **General rule.** A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.

(2) **Presentation of evidence.** A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(3) **Impartiality of presiding officers and reviewing officers.** The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.

(4) Agency decisional process

(A) A presiding officer shall make the recommended or initial decision unless he or she becomes unavailable to the agency.

(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

(E) The requirements of this paragraph do not apply—

- (i) in determining applications for initial licenses;
- (ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (iii) to the agency or a member or members of the body comprising the agency.

(5) **Ex parte communications.** The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.

(6) **Decision.** The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the

⁷⁵ The provision for declaratory orders is moved from §554 to §555. See VI. below.

record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

(7) Additional protections. An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

C. Sunshine Act exception.

Section 552b(c)(10) in the Government in the Sunshine Act provides an exception to the Sunshine Act requirements for the "initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." This section should be amended to make clear that the exception applies also to Type B adjudication.

II. Ethical standards and protection against reprisal

A. Ethical standards

Add new section 559a:

559a. Ethics and independence of presiding officers and administrative law judges

(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

(b) The regulations shall be prescribed in accordance with sections 553(b) and (c) of this title.

B. Removal and discipline of presiding officers

Add a new section 559b:

559b. Removal and discipline of presiding officers

(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to discipline or removal of a presiding officer.

III. Clarification of the definition of rule

APA section 551(4) should be amended to read as follows:

(4) "rule" means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;

_____ "rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

IV. Type A adjudication: guidelines for Congress and a default provision when statute is unclear

A. Criteria for deciding whether new programs should be Type A adjudication.

When Congress creates a new program involving adjudication with opportunity for an evidentiary hearing, it should consider and explicitly determine whether the new program will be Type A or Type B adjudication.

Congress should consider the following factors (the presence of which would weigh in favor of the use of Type A rather than Type B adjudication):

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.

b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.

Please note that this provision relating to criteria for choosing between Type A and Type B adjudication is not included in the Bill language above since it is not intended to be a statutory provision.

B. Default provision.

Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary, in any future legislation that creates an opportunity for hearing in an adjudication, such hearing shall be Type A adjudication.

V. Issues relating to evidence

Section 556(d) should be amended by adding the italicized language:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. *Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.* A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party *and may be entirely based on evidence that would be inadmissible in a civil trial.* [The remainder of §556(d) remains the same]

VI. Declaratory orders

Section 555 should be amended by adding thereto the following subsection:

(f) Declaratory orders. The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

VII. Transcripts

Section 556(e) should be amended by adding the italicized language and striking the crossed-out language:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title. ~~and, on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

The provisions of this act supersede existing contrary statutory provisions.

Appendix B

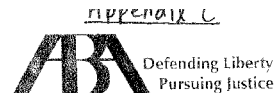
RECOMMENDATION 126A

ADOPTED BY THE
HOUSE OF DELEGATES

OF THE
AMERICAN BAR ASSOCIATION

February 1989

BE IT RESOLVED, that the American Bar Association supports the reauthorization of the Administrative Conference of the United States (ACUS) and the provision of funds sufficient to permit ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform.

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR
Randy D. Evans
(202) 662-1765
rd.evans@abamail.org

DEPUTY DIRECTOR
Thomas A. Cochran
(202) 662-1761
tcochran@abamail.org

July 18, 2006

STAFF ATTORNEY COUNSEL
S. Louise Finney
(202) 662-1766
sfinney@abamail.org

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

LEGISLATIVE COUNSEL
John C. Carter
(202) 662-1763
jcarter@abamail.org

The Honorable Robert C. Byrd
Ranking Member
Committee on Appropriations
United States Senate
Washington, D.C. 20510

LEGISLATIVE COUNSEL
Kathleen J. Callahan
(202) 662-1769
kcallahan@abamail.org

LEGISLATIVE COUNSEL
Kerry M. Lawrence
(202) 662-1764
klawrence@abamail.org

Re: Funding the Newly Reauthorized Administrative Conference of the
United States for Fiscal Year 2007

LEGISLATIVE COUNSEL
E. Anne Kirschner
(202) 662-1760
ekirschner@abamail.org

Dear Chairman Cochran and Ranking Member Byrd:

DIRECTOR, CIVIL RIGHTS
DEPARTMENT OF JUSTICE
John A. Smith
(202) 662-1764
jsmith@abamail.org

INTELLIGENCE POLICY
LAW OFFICER
Helen C. Gentry
(202) 662-1772
hgentry@abamail.org

STATE LEGISLATION COUNSEL
Rita C. Aggeler
(202) 662-1760
raggeler@abamail.org

EXECUTIVE ASSISTANT
Dana E. Smith
(202) 662-1770
dsmith@abamail.org

STAFF COUNSEL FOR
INFORMATION SERVICES
Sharon Greene
(202) 662-1763
sgreene@abamail.org

LEGAL COUNSEL FOR
INFORMATION SERVICES
Kathleen J. Callahan
(202) 662-1769

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2007 at the fully authorized level of \$3.2 million. As your Committee prepares to mark up the Transportation, Treasury Appropriations Bill later this week, we urge you to provide full funding for ACUS, which was just reconstituted in the last Congress by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at <http://www.abanet.org/poladv/ACUSreauthorization.html>.

July 18, 2006
Page 2

Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate at the end of the 108th Congress. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service (“CRS”) prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at <http://www.abanet.org/poladv/ACUSreauthorization.html>. As outlined by CRS, ACUS has many virtues, including the following:

- A newly-reconstituted ACUS would provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues. The CRS Memorandum concludes that “[ACUS’s] reactivation would fill the current urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts,” including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission’s recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, and possible refinements to the Congressional Review Act. A fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.

- ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective. As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, “...the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions.” ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings. As CRS explained, ACUS produced over 180 recommendations for agency, judicial, and congressional actions over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that “all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation.”

- Before it was terminated in 1995, ACUS brought about many significant achievements. In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the

July 18, 2006
Page 3

Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act. In addition, ACUS' recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, CRS cited testimony from the President of the American Arbitration Association which stated that "ACUS's encouragement of administrative dispute resolution had saved 'millions of dollars' that would otherwise have been spent for litigation costs." CRS also noted that in 1994, the FDIC estimated that "its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million." The CRS Memorandum provides numerous additional examples of ACUS' prior successes as well.

• ACUS' role in the regulatory process is totally separate and distinct from that of OIRA. In the past, some have suggested that ACUS' activities perhaps may duplicate some of the activities of OMB's Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of ACUS' fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange "best practices" ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA's principal role is to represent the President in making sure that the Administration's regulatory policy is followed. ACUS's role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that necessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide \$3.2 million in funding for ACUS for fiscal year 2007 during your Committee's mark up of the Transportation Treasury Appropriations Bill later this week.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Chair of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/586-6758.

Sincerely,



Robert D. Evans

July 18, 2006
Page 4

cc: The Honorable Christopher S. Bond
The Honorable Patty Murray
All other members of the Senate Committee on Appropriations
The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
The Honorable Charles E. Schumer
The Honorable Jerry Lewis
The Honorable David R. Obey
The Honorable Joseph Knollenberg
The Honorable John W. Olver
The Honorable Chris Cannon

Appendix D

RECOMMENDATION 106A
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
August 9, 2005*

RESOLVED, that the American Bar Association encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

REPORT

Federal administrative law judges ("ALJ") have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.¹

The Office of Personnel Management ("OPM") is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.² However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act ("APA"). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C. § 3105.³ Their powers emanate

¹The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

² The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies:

"The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM:

An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203a. Id. § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

³ See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

from the Administrative Procedure Act.⁴ Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.⁵ After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation⁶ and that ALJs are functionally equivalent to other Federal trial judges.⁷

Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters...

The Office of Personnel Management

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM's administration of the program. The AIA contemplated that the Civil Service Commission (now OPM)⁸ would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointment), §3344 (loans), and §5372 (pay) OPM "may... investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees." Although the OPM Program Handbook, p. 4, affirms those responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benign changes in selection and RIF regulations.⁹

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)¹⁰, in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

⁴ See, A Guide to Federal Agency Adjudication, Michael Asinow, ed., 164 (*American Bar Association Administrative Law Section*, 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judges. *Id.* The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

⁵ Amiel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 *Judicature* 216, 218 (1987).

⁶ *Butz v. Economou*, 438 U.S. 478 (1978).

⁷ *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); see also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

⁸ Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board ("MSPB").

⁹ See Appointment, Pay, and Removals of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb.23, 1998).

¹⁰ Now the National Conference of the Administrative Judiciary.

OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program.¹¹ However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that "several of your concerns appear to be more appropriately identified as agency matters" and that "other concerns appear to involve matters which conflict with this agency's evolving policy of returning greater responsibility for personnel management to the agencies." The letter did not address the fact that such a policy might conflict with OPM's responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While *Azdell*¹² was pending, OPM suspended the examination process for administrative law judges (ALJs). Therefore, the ALJ register became dated. With one exception,¹³ agencies could not hire judges from the ALJ Register during this period. In *Bush v. Office of Personnel Management*, 315 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to be given part of the ALJ examination, the Federal Circuit determined that the suspension of testing was a reviewable employment practice.¹⁴ On

¹¹ 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].

¹² *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368 (Fed. Cir. 2003).

¹³ In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See *Hearing Before the Subcommittee on Social Security Of the Committee on Ways and Means House of Representatives*, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

¹⁴ Sunsetting American Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance

February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (PRL),¹⁵ resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.¹⁶

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.¹⁷

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges' program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions ~~for~~ to promote administrative uniformity.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for

OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the *Azdell* litigation.

¹⁵ Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any ALJ vacancy ahead of others on the ALJ register of eligibles maintained by OPM.

¹⁶ *Rutberg v. United States*, No. 98-10752-JUT, Order dated December 10, 1998, 1998 U.S. Dist. LEXIS 19832 (D. Mass., 1998).

¹⁷ In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon 5F)(ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (*In re Chocallo*, 1 MSPBR 612, 651 (1978)) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.

Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.¹⁸

Promote Professionalism

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy.¹⁹ ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.²⁰

Promote Public Confidence

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

Congressional Oversight

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.²¹

Respectfully Submitted,

Louraine Arkfeld, Chair, Judicial Division
August, 2005

¹⁸ Policy 101B, 2001, *ABA Policy/procedures Handbook*, 193 (2004).

¹⁹ Standards for the Education of the Administrative Judiciary, Policy 99 A101, *ABA Policy/Procedures Handbook*, 268 (2004).

²⁰ Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.

²¹ See ABA Policy, August, 1997, *ABA Policy/Procedures Handbook: Policy on Legislative and National Issues*, 233 (2004).

Mr. CANNON. I am now pleased to introduce the witnesses for today's hearing.

Our first witness is Dr. Bill West of the Bush School of Government and Public Service at Texas A&M University. A 1971 graduate of the United States Military Academy, Dr. West earned his Ph.D in political science at Rice University. Currently, he teaches public policy administration at the Bush School. He also serves as the school's director of the Master in Public Service and Administration program. Dr. West has authored two books and published numerous articles.

Our next witness is Marshall Breger, who is a professor of law at the Columbus School of Law at the Catholic University of America and was my chief of staff Matt Landoli's professor while he studied at Catholic.

Professor Breger has had a diverse career. From 1993 to 1995, he was a senior fellow at The Heritage Foundation. During the prior Bush administration, he served as solicitor of labor, the chief lawyer for the Labor Department. In 1992, he served concurrently by presidential designation as the acting assistant secretary for labor management standards.

As I alluded to earlier, Professor Breger was the chairman of ACUS from 1985 to 1991. For 2 years during that period, he served as an alternate delegate of the United States to the United Nations Human Rights Commission in Geneva.

A prolific writer and editor, Professor Breger is vice president of the Jurispolicy Center, a Jewish conservative think-tank. Professor Breger obtained his undergraduate and master's degrees from the University of Pennsylvania. He received his law degree magna cum laude from the University of Pennsylvania, where he was an editor of the law review and a member of the Order of the Coif.

Our third witness is Professor Elizabeth Magill of the University of Virginia Law School, where she teaches, not surprisingly, courses on administrative law, as well as on food and drug law and constitutional structure.

Upon obtaining her undergraduate degree from Yale College, Professor Magill served as a senior legislative assistant for North Dakota Senator Kent Conrad. Thereafter, she obtained a law degree from the University of Virginia School of Law. After graduating from law school, Professor Magill clerked for the Honorable J. Harvey Wilkinson of the Fourth Circuit Court of Appeals, and then for Justice Ruth Bader Ginsburg. Like her fellow panelists, Professor Magill has also published extensively.

Our final witness is Professor Cary Coglianese. As I noted in my opening remarks, Professor Coglianese was the moderator of the Subcommittee's symposium on e-rulemaking, which was held in this very room last December.

Welcome back.

Professor Coglianese is the Edward B. Shils professor of law and professor of political science at the University of Pennsylvania Law School. Prior to joining the University of Pennsylvania, Professor Coglianese spent 12 years on the faculty of the John F. Kennedy School of Government at Harvard. While there, he served as the faculty chair in the school's Regulatory Policy Program and director of its Politics Research Group.

Professor Coglianese received his undergraduate degree from Albertson College. He then went on to the University of Michigan, where he received his law degree and master's degree in public policy, as well as a doctorate in political science.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing.

In light of the fact that your written statements will be included in the record, you may not want to limit your comments to 5 minutes. We will have time for questions, and you can certainly volunteer things during the Q&A. I don't think we are going to have a great deal of competition from other Members of the Committee here.

You do have a lighting system in front of you. After 4 minutes, it turns from green to yellow. It is my habit to tap just with a pencil or something to draw your attention to the fact that we are getting to that point. It is not a big deal today, given the fact that we are not overwhelmed with folks that want to ask questions.

After you have presented your remarks, we will go in order, if others arrive, of arrival, to ask questions. Pursuant to the direction of the Chairman of the Judiciary Committee, I ask the witnesses to please stand and raise your right hand to take the oath.

[Witnesses sworn.]

The record should reflect that the witnesses all answered in the affirmative.

You may be seated.

Professor West, would you please proceed with your testimony?

TESTIMONY OF PROFESSOR WILLIAM WEST, THE BUSH SCHOOL OF GOVERNMENT AND PUBLIC SERVICE, TEXAS A&M UNIVERSITY, COLLEGE STATION, TX

Mr. WEST. I am Bill West from The Bush School of Government and Public Service at Texas A&M University. Thank you for inviting me to testify in commemoration of the 60th anniversary of the APA.

My testimony today will focus primarily on parts of a recent exploratory study of how agencies develop proposed rules. The study was conducted by a team of seven Bush School students that I supervised and that was supported by the Congressional Research Service. Curtis Copeland and Mort Rosenberg of CRS provided invaluable support and guidance for the project.

I might also note that Caitlyn Miller, who is the student leader of the project, is here today.

Mr. CANNON. Could I interrupt and ask who Ms. Miller is? Could we have her raise her hand?

Welcome. Nice to have you here today.

Pardon me for the interruption.

Mr. WEST. That is fine.

The 60th anniversary of the APA is a good occasion to consider its effects and its limitations. An especially important, if neglected topic, is that part of the rulemaking process that takes place before the APA's requirements come to bear. Notice and comment is intended to ensure that rulemaking is transparent and accessible to all relevant stakeholders. Yet although these procedures are un-

doubtedly salutary, it is also true that they come to bear at a relatively late stage in the decision-making process.

The part of the rulemaking process that precedes the publication of notice frequently lasts for several years and almost always results in a specific and thoroughly justified policy proposal. It is where the most critical decisions often occur. If public notice and comment is intended to promote inclusive and transparent participation in decision-making therefore, how inclusive and transparent is participation in proposal development?

As a starting point, one thing that our study finds is that pre-notice participation is common and that it takes place through a variety of mechanisms. Although participants vary a great deal from one agency to the next, and indeed from one rule to the next, they can include representatives of industry and other affected interests, public interest groups and other agencies. OMB and other entities within the executive office of the president are also sometimes involved.

Unlike notice and comment under the APA, however, participation in the development of proposed rules usually does not occur by general invitation. Rather, it is informal and occurs at the specific invitation of the agency or at the initiative of the participant. The primary exception to this is when agencies solicit comments from all interested parties through an advance notice of proposed rulemaking. Although agencies' use of advanced notice varies, it is never routine or even frequent. It is probably employed significantly less than 5 percent of the time across the Federal bureaucracy.

Participation during the pre-notice phase of rulemaking thus is not subject to the same institutional guarantees of inclusiveness that the APA provides during the comment phase. Whether this is a problem, much less a problem that Congress should address, suggests a number of more specific questions.

For example, how effective are agencies in gathering input from all relevant stakeholders during proposal development? If they are not effective, do the APA's notice and comment requirement serve as a check on earlier imbalances in participation? Would the benefits of institutional reforms that might increase inclusiveness in proposal development outweigh their costs in terms of administrative efficiency?

Our examination of pre-notice rulemaking also addresses the question of transparency. Although the APA is silent on the subject, there has been an expectation since the 1970's that agencies base their rules on a record. Although they generally docket communications outside the executive branch that occur after the publication of notice, however, there is wide variation across agencies in pre-notice docketing practices. Some indicate that they record all communications with non-executive actors throughout this phase. Others indicate that they do not require any pre-notice docketing.

In between these two extremes there is variation in the types of communications placed on the public record and in the stage of the proposal development process at which docketing begins. As with inclusiveness, the policy issues surrounding transparency are complex.

If on-the-record communications promote openness in decision-making, for example, they may also impede the collection of needed information. As in the legislative process, moreover, on-the-record communications may be inimical to the bargaining and compromise required for the accommodation of affected interests.

Some officials we interviewed for our study also indicated that off-the-record communications with other agencies and OMB were important for coordination among administrative programs. Indeed, any effort by Congress to require docketing within the executive branch would necessarily have to consider the court's sympathy for a unified executive in recent decades.

I should hasten to emphasize that our study was designed to identify key issues, rather than to resolve them. In these and many other respects, gaining a better understanding of the administrative process is an essential foundation for sound institutional policy.

Again, I am grateful for the opportunity that you and CRS have given to us to explore one broad dimension of rulemaking, and I applaud other recent initiatives to shed more light on topics such as e-rulemaking and the role of advisory committees in administrative decision-making.

As an extension of these last observations, let me close by stressing the need to devote more resources to policy and legal analysis in the administrative process. For years, the Administrative Conference of the United States produced objective studies by first-rate scholars that were of considerable practical, as well as academic value.

I am happy that ACUS has been reauthorized, and I would like to join those who have argued that it should be re-funded as well. This would produce substantial benefit for relatively little cost.

Thank you.

[The prepared statement of Mr. West follows:]

PREPARED STATEMENT OF PROFESSOR WILLIAM WEST

I am Bill West from the Bush School of Government and Public Service at Texas A&M University. Thank you for inviting me to testify in commemoration of the 60th anniversary of the Administrative Procedure Act. I am honored to be here.

My testimony today will focus primarily on the results of a recent study of how agencies develop proposed rules. The study was conducted by a team of seven Bush School students that I supervised and that was supported by the Congressional Research Service. Curtis Copeland and Mort Rosenberg of CRS provided invaluable support and guidance for the project. I am also grateful to Daniel Mulhollan, Angela Evans, and Kent Ronhovde for their initiatives in establishing a relationship between CRS and the Bush School. Our study of rulemaking is one of several worthwhile projects that CRS has sponsored at the Bush School and other schools of public affairs.

The Administrative Procedure Act is a venerable statute that has served the nation well. As many have remarked, however, American administrative law was a comparatively new field at the time the APA was enacted and the so-called bureaucratic state was still in its relative infancy. New procedural constraints on agency discretion have been added as the bureaucracy has grown and as new issues of legitimacy and accountability have arisen. Mechanisms for direct oversight of administrative policy making have been added as well. The most important development in this latter regard has been the institutionalization of regulatory review in the Executive Office of the President that has occurred over the past three decades.¹ The

¹James Blumstein, "Presidential Administration and Administrative Law: Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues," *Duke Law Journal* 51 (2001).

various controls that shape the administrative process have been added largely in a piecemeal fashion and perhaps without sufficient consideration of how they all fit together.

In any case, the 60th anniversary of the APA is an appropriate occasion to consider its effects and its possible limitations. With regard to rulemaking, one might examine the effects of public comment on agency decisions or the impact of judicial review (or the threat thereof) as the meaning of the “arbitrary-or-capricious” standard has evolved. Or one might examine the relationship between the APA’s objectives, on the one hand, and centralized executive oversight of rulemaking on the other. Scholars have, in fact, given a good deal of attention to these and other important topics relating to formal, institutional constraints on agencies’ exercise of legislative discretion.

At the same time, scholars have practically ignored the informal processes that precede the APA’s notice-and-comment requirements and most other controls on rulemaking. This, despite the fact that the most important policy decisions in rulemaking are arguably made as proposals are being developed. I have noted elsewhere that the notices of proposed rulemaking that appear in the Federal Register are usually very specific. Further, they often take years to develop and reflect a substantial investment of agency resources. Important proposals are sometimes accompanied by book-length documents that lay out their legal and empirical premises. Suffice to say that agency officials usually feel that they are on firm ground before they invite public comment, and that the most critical issues in terms of defining problems and eliminating alternative solutions to those problems have at least tentatively been resolved.²

This is not to deny the importance of notice and comment. Several recent studies have found that agencies do sometimes alter proposed rules in ways that are consistent with the comments they receive.³ As a matter of perspective, however, it is difficult for agencies to change proposed rules in fundamental ways. An obvious disincentive is sunk organizational costs. Intertwined with this is the fact that the demands of due process may compel agencies to invite additional comments in response to substantial changes, thus lengthening an already protracted process.⁴ An irony of rulemaking procedures is that the effort to ensure the viability of public comment by requiring agencies to base their decisions on a record (as the courts have generally done since the 1970s and has Congress has done in some enabling legislation) creates an incentive for agencies to develop proposals that will not need to be changed.

With these observations as a point of departure, the project that we conducted for CRS examines how agencies develop proposed rules. It relies primarily on agency documents, on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules, and on telephone interviews with high-level agency careerists with extensive experience in the rulemaking process. As an exploratory study, it addressed three general sets of issues as a way of identifying questions for further research: how are rulemaking initiatives placed on agencies’ agendas; how is the rulemaking process managed within and across agencies; and what is the character of outside participation in the development of proposed rules. The last of these questions may be especially relevant to the Congress as it considers possible amendments to the APA.

The goals of the APA offer a frame of reference for evaluating participation in proposal development. The Act sought to provide some uniformity across agencies (at least regulatory agencies) as they carried out their quasi-judicial and quasi-legislative responsibilities. By the same token, it sought to ensure a degree of due process that was appropriate for each of these functions. In the case of rulemaking, the “informal” or “notice-and-comment” procedures set forth in section 553 were designed to promote a certain level of rationality as well as transparency and inclusiveness in administrative policy making. The requirements that agencies publish a notice

²William F. West, “Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making,” *Public Administration Review* 64: 66–80 (February 2004).

³*Ibid.* Also see Steven J. Balla, “Administrative Procedures and Political Control of the Bureaucracy,” *American Political Science Review* 92: 663–673 (1998). Marissa Martino Golden, “Interest Groups in the Rulemaking Process: Who Participates? Who Gets Heard?” *Journal of Public Administration Research and Theory* 8: 245–70 (1998). Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, 2d. ed. (Washington, D.C.: Congressional Quarterly Press, 2003). Susan Webb Yackee, “Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking,” *Journal of Public Administration Research and Theory* 26: 103–24 (2006).

⁴West, *supra* note 1. These observations were also confirmed in some of the interviews conducted for the study described in this testimony.

in the Federal Register and solicit comments from any and all interested parties were designed to promote these latter, democratic values.⁵

As many have noted, developments in administrative law over the past three-and-a-half decades have been intended to reinforce these goals. The most important has been the requirement that agencies based their rules primarily on a record. This has resulted in part from provisions in some enabling statutes that supersede the APA and in part from judicial (re)interpretation of the APA's "arbitrary or capricious" standard of review. Although the courts have backed off from the precedents of the 1970s in some respects, the "hard-look" doctrine of review is hardly dead—especially if one compares current practices with those that existed during the first two-and-a-half decades after the APA's passage. Whether instituted by Congress or the courts, the extension of more rigorous due process to rulemaking has been motivated in part by the desire to ensure that bureaucracy consider all legitimate comments in arriving at policy decisions.⁶ This goal became popular as the result of the allegation that agencies were "captured" by special interests.⁷

If many of the most important decisions are made before notice appears in the Federal Register, however, what of the participation that occurs as agencies are developing proposals? How inclusive and transparent is that process? As with most of the other issues we examined in our study, there are no simple answers here. This is largely because agency practices are so diverse with regard to most of the key dimensions of proposal development. Although we had hoped that the data from our electronic survey would allow us to make systematic comparisons of such variation across agencies and policy areas, a low response rate prevented this. Still, our interviews and survey data allow for some important observations that suggest further study and that may ultimately be relevant for institutional reform. Indeed, the observation that such variation exists may be significant in and of itself given the relative standardization of practices within the comment phase of rulemaking.

One thing that we found is that outside participation in proposal development is common. Although it does not always occur, it does occur frequently. Not surprisingly, in fact, a number of the officials we interviewed noted that gathering information from people outside of the agency was frequently indispensable to intelligent decision making. Although participants vary a great deal from agency to agency and from one rule to the next, they can include representatives of industry and other affected interests, public interest groups, and other agencies. The latter might become involved in order to resolve jurisdictional issues or coordinate across programs or to represent the interests of their constituents.

OMB's Office of Information and Regulatory Affairs can also be an important participant in proposal development. Although its level of involvement varies a good deal from one agency to the next, some officials characterized OIRA as the "800-pound gorilla." Its informal role in policy formulation is undergirded by the formal powers it enjoys at a later stage to return for reconsideration proposed rules that are not properly justified or that are inconsistent with the president's agenda. In contrast, there was a near consensus among those we interviewed that, although specific statutory requirements were a very important source of rulemaking initiatives in some agencies, the extent and impact of congressional involvement in the development of proposed rules tended to be quite limited.

Beyond the observation that it occurs and that it can involve various actors, we found that the character of participation varies considerably. The timing of input is one important dimension of variation. Some officials indicated that their agencies communicate with extra-governmental actors throughout proposal development while others indicated that their policy is to terminate communications at an intermediate stage of the process. Among the latter, the most common termination point is after the agency has collected general views about the nature of the problem being addressed and possible solutions to that problem and before it begins to articulate and support a specific policy proposal. The mechanisms of participation also vary a great deal. They range from informal conversations at trade conferences or over the telephone to e-mails and letters to hearings to advisory committees, among various other possibilities. Some agencies even use focus groups on occasion.

A generalization that one can offer about participation in proposal development, however, is that—unlike notice-and-comment under the APA—it *does not usually occur by general invitation*. Rather, it occurs either at the specific invitation of the

⁵ *The Administrative Procedure Act: A Legislative History* (Washington, D.C.: U.S. Government Printing Office, 1946) Senate Doc. 248, 79th Cong., 2d. Sess.

⁶ Colin S. Diver, "Policymaking Paradigms in Administrative Law," *Harvard Law Review* 95: 393–434 (1981).

⁷ Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88: 1667–1814 (1975).

agency or at the initiative of the participant. The primary exception to this generalization is when agencies solicit comment from all interested parties through an advanced notice of proposed rulemaking. Yet although the use of ANPRMs varies from one agency to the next, they are never used on a routine or even a frequent basis. Although we did not gather precise data, it appears as if they are employed significantly less than five percent of the time across all rulemaking.

Our interviewees offered several explanations for their reluctance to use advance notices more often. One was that ANPRMs were an additional source of delay in a process that was already slowed by numerous procedural hurdles. This disincentive was sometimes reinforced by pressures from Congress and elsewhere to issue rules in a timely fashion. Another explanation was that advanced notices did not produce any useful information beyond what the agency could obtain by contacting stakeholders individually. Not surprisingly, virtually all of the officials we interviewed indicated that they made assiduous efforts to gather all relevant perspectives, and many expressed confidence that they usually knew who were affected by their rules. In addition, several officials noted that, because it did not occur in response to a specific proposal, comment pursuant to advance notices was too unfocused to be of much value. Two of the senior people we interviewed noted that their agencies' use of ANPRMs had declined in recent years as the result of these factors.

In brief, then, although critical policy decisions are at least tentatively made during proposal development, participation during that phase of rulemaking is not subject to the same institutional guarantees of inclusiveness that the APA provides during the comment phase of rulemaking. Whether or not this is a problem, much less a problem that Congress should seek to address is a complex issue that involves a variety of considerations. One obvious question is whether agencies are effective in gathering input from all relevant stakeholders during proposal development (or whether participation and influence tends to be confined to the "usual suspects"). To the extent participation during proposal development is not inclusive, another important set of questions have to do with whether the APA's notice and comment requirements redress participatory imbalances during proposal development. Are agencies willing to make substantial changes in proposed rules? Given the resources required for effective comment, moreover, the formal opportunity to offer feedback on proposed rules may have little practical effect in enfranchising those who have not had access to agency decision makers during proposal development. Finally, even if Congress could promote inclusiveness through institutional constraints on proposal development, the potential benefits of such a reform must also be weighed against its costs in terms of administrative efficiency and effectiveness. The officials we interviewed were unanimous in their opinion that requiring advanced notices for all or certain classes of rulemaking would impose undue delay on decision making.

Our study also addressed the related issue of transparency in proposal development. Again, although the APA is silent on the subject, there has been an expectation since the 1970s that agencies base their rules on a record. Given this, almost all of the officials we interviewed indicated that they made available to the public all communications with actors outside of the Executive Branch (including legislators and legislative staff) that occurred after a notice appeared in the Federal Register. In contrast, there was wide variation in pre-notice docketing practices. A high-level official in the general counsel's office of one department indicated that his agency's policy was that practically all communications with non-executive actors must be recorded. In contrast, another official indicated that his agency did not feel a need to docket any pre-notice communications. In between these two extremes, some interviewees said that their agencies did not docket early communications designed to collect general information about problems but became more conscious of the need to docket communications at the later stages of proposal development. Others indicated that they tended only to docket communications that were material to their proposed rules.

Such wide variation in docketing practices may be attributable in part to the current ambiguity of judicial precedent in this area over the past thirty years. It is also undoubtedly attributable to agency culture and tradition, as well to the preferences key officials. One senior careerist with a good deal of influence over administrative procedures within his department indicated that he favored strict docketing requirements on policy as opposed to legal grounds. Given that most pre-notice participation occurred at the specific invitation of agency officials, he felt that recording such communications was desirable as a way of avoiding perceptions of bias in the process.

As with inclusiveness, the prescriptive issues surrounding transparency are complex and invite further research. If off-the-record communications obviously detract from the openness (and thus perhaps the legitimacy) of proposal development, they

may also be desirable in terms of administrative efficiency and effectiveness. Although the officials we interviewed were not as consistent in their opposition to docketing requirements as they were to advanced notices, a number of them indicated that *ex parte* conversations facilitated the kind of information gathering required for rulemaking. As in the legislative process, moreover, on-the-record communications may be inimical to the bargaining and compromise required for the accommodation of competing interests. Although agency officials involved in rulemaking typically describe it as a “technical” process of ascertaining legislative intent and making sound factual determinations, there is little doubt that it is also frequently a political process that requires “partisan mutual adjustment” among competing interests. (It usually requires only a little prodding in interviews to bring this out.)

Some officials also indicated that off-the-record communications with other agencies and OMB were important for coordination and management among administrative programs. Indeed, any effort by Congress to require the docketing of communications within the Executive Branch would necessarily have to consider the legal implications of such a policy. This observation is underscored by the Supreme Court’s sympathy in recent decades for a “unified executive” as a means of rationalizing policy implementation across the federal bureaucracy.⁸ Yet while managerial prerogatives within the executive are certainly an important consideration, it is also true that other agencies, OMB, and the White House sometimes act as conduits for private interests in their efforts to influence rulemaking. This is well-documented in the case of OIRA, for example.⁹ To some extent, therefore, docketing requirements for non-governmental actors but not for members of the Executive Branch might have the potential to produce a misleading appearance of transparency.

All of this is to say that the development of proposed rules deserves much more attention than it has received. It is the proverbial black box; the part of the iceberg that lies under the water. Again, our study was an exploratory effort designed to identify some of the key parameters of variation in the process and to identify important questions rather than to answer them. That was true of our consideration of agenda setting and the management of proposal development as well.

In the case of agenda setting, for example, we found that whereas some agencies’ rulemaking consisted primarily or exclusively of discretionary initiatives that derived from various sources (agency staff research, feedback from enforcement officials, suggestions from affected groups, etc.) other agencies’ agendas were dominated by non-discretionary (legislatively required) rules. Still other agencies combined the two in various proportions. A systematic, cross-agency study of where ideas for rules come from and of why some ideas become rules and others do not can add a good deal to our understanding of how government works. An examination of agenda setting might also have prescriptive value. In the case of one agency, for example, although non-discretionary rules comprised a minority of its total workload, the fact that they took precedence nonetheless made it difficult to plan and execute a coherent agenda for all rulemaking. The official with whom we spoke felt that more effective communication with Congress could help alleviate this problem.

The management of proposal development is also a fertile area for further investigation. For example, we found that some agencies have highly detailed, formalized procedures whereas others have no written policies to guide the process. The degree to which key decisions in the formulation of proposed rules is centralized at the departmental level also varies a good deal. To observe that such variation exists naturally suggests the questions of why it exists and what difference it makes in terms of agency performance.

There are many other important dimensions of proposal development that have received little if any attention. For example, what are the forms and roles of advisory committees and to what extent do these bodies provide effective representation for stakeholders? Another important set of questions concerns whether and how rulemaking is coordinated across agencies. The list could go on.

This is not to say that studying proposal development is easy. Evaluative and prescriptive analysis is complicated at the conceptual level by the fact that we expect different qualities in the rulemaking process. Given its legislative nature, we naturally want it to reflect the democratic values of openness and balanced responsiveness. Given its administrative nature, we also want it to be carried out in as timely and efficient a manner as possible. A third criterion, which might be labeled “substantive rationality,” is the expectation that rulemaking decisions be objective and

⁸ Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001).

⁹ For a recent discussion see William F. West, “The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA,” *Presidential Studies Quarterly* 35 (March 2005).

based on rigorous empirical evidence. All of these criteria are legitimate bases for assessing proposal development (and rulemaking more generally). As might be evident from the preceding discussion, however, they all potentially conflict with one another in critical ways.

Data collection presents another, more practical challenge to the study of proposal development. Because of its extreme diversity, studies that focus on one or a few cases are of limited value in developing generalizations. Conversely, gathering process-related data for a large sample of rules can be a daunting task. As we found, for example, efforts to accomplish this goal through surveys of agency personnel face several obstacles, not the least of which is the inherent reluctance of bureaucracy to share information. Indeed, two agencies ordered their staff not to comply with our survey despite (or perhaps because of) a cover letter indicating that it was being conducted under the auspices of CRS and the Judiciary Committee. Even the senior officials we interviewed, all of whom were extremely helpful, were sometimes unable to share internal documents describing the rulemaking process.

Still, the research needs to be done. Gaining a better understanding of the administrative process is an essential foundation for sound institutional policy. Again, I am grateful for the opportunity that you and CRS have given us to explore one broad dimension of rulemaking and I also applaud other recent initiatives to shed more light on topics such as e-rulemaking and the use of advisory committees.

As an editorial observation, let me close by stressing the need to devote more resources to policy and legal analysis in these and other areas of the administrative process. For years, the Administrative Conference of the United States produced studies by first-rate scholars that were of considerable practical as well as academic value. Because it was clearly non-partisan and free of organizational ties that might otherwise bias its analysis, ACUS enjoyed the kind of access to agencies that is necessary for studying many of the most important issues in the administrative process. I am happy that ACUS has been re-authorized, and I would like to join the more distinguished individuals who have argued that it should be funded as well. This would produce substantial benefit for relatively little cost.

Thank you.

Mr. CANNON. Thank you. We will use that last statement when it comes to get it re-funded.

Professor Breger, you are recognized for 5 minutes.

TESTIMONY OF PROFESSOR MARSHALL BREGER, THE CATHOLIC UNIVERSITY OF AMERICA-COLUMBUS SCHOOL OF LAW, WASHINGTON, DC

Mr. BREGER. Thank you. My name is Marshall Breger. I teach at the Columbus School of Law at The Catholic University of America. I am pleased to join you today in this discussion of the future of the Administrative Procedure Act.

If I may just follow along with Congressman Watt's comments, the Administrative Procedure Act may be 60, but I think like many baby-boomers, it is not ready for retirement, rather for reviving, re-tuning, and hopefully a new lease on life.

Having said that, the APA has served us well for the last 60 years, but we have to remember we are today in a different time and a different place. In 1946, over 90 percent, and I could get you the exact numbers, but over 90 percent of the activities of administrative agencies were adjudications. Now, it has flipped. It is mostly rulemaking.

In 1946, we came out of the New Deal with great enthusiasm, belief in the power of the regulatory process to address political, economic, and social problems. Today, we are more realistic, if not more skeptical. Indeed, we have a kind of default position for market solutions and the regulatory process has to prove itself in every instance. But being skeptical about regulation does not mean that you should be uninterested in the regulatory process. In fact, it means you need to think more hardly, more seriously, and have

more empirical research about regulation, what works, what doesn't work, and what works better. So I am very pleased that this Committee is beginning to address that issue.

I am going to speak about a number of issues in rulemaking, which I believe is the gravamen of this hearing, that I think are important to consider in thinking about revisions of the APA. First, informal rulemaking. You know that the notice and comment rule-making process has been called by Kenneth Davis the greatest invention of Government in the 20th century. No doubt, it swept the board and changed the nature of the administrative process.

However, we have seen in the last 60 years growing accretion of requirements for what is supposed to be informal, from the judiciary, growing accretions of requirements from Congress in mandates, and from the White House OIRA process, making informal more formal.

We have had the growth of non-statutory informal rulemaking techniques, interim rulemaking, direct final rulemaking, advance notice of proposed rulemaking. And we have had the increasing tendency for agencies to bypass the "informal" notice-and-comment process using interpretive rules and other forms of guidance to avoid what they call the "ossification" of the rulemaking process.

Now, we certainly don't want ossification. What we have to think of now, is the time to begin to institutionalize and codify some of these non-statutory techniques and to consider how to pattern interpretive and guidance documents to make sure that they provide the proper transparency and public participation that the Administrative Procedure Act stands for.

Secondly, we have seen and we will see a growth in cooperative regulation, EPA, OSHA, VPP program, EPA Brownfields program, where there is an individuated interaction between the regulated entity and the regulator. It is trying to find flexible individual solutions. This is good. This is terrific, but it leaves us a challenge. How to have flexibility and at the same time neutrality, fairness and the rule of law? The rulemaking process has to think about that.

Similarly, we have to think about public-private partnerships. We have had and we will have an increased growth in public-private partnerships, Government-sponsored enterprises, Government corporations, contracting out of what we generally think of as public functions, charter schools, private prisons. Does administrative law end when we start to move out of the traditional or classic public bureaucracy? That is a challenge for administrative law and for the APA.

Judicial review. When the APA was passed, it instituted the notion of substantial evidence on the record as a criteria for judicial review. Justice Frankfurter said, Congress has set a mood for the judges to follow in reviewing administrative agency actions. Sixty years is a great deal of judicial experience. It may be appropriate for Congress to revisit that mood and recalibrate its notions of the proper relationship between judicial review of the courts and the agencies.

And similarly, the whole problem of deference to agency interpretations of statutes and regulations, the Chevron case, and now the

Mead and cases following, call out for some guidance from Congress on what the proper canons of construction should be.

Finally, I think we need to be looking at State and local innovations. There is a tendency when the APA was passed, to Federal administrative law. That is what we study. That is what we focus on. There has been a really cauldron of creativity in the States, California, Arizona, Florida to name a few. We need studies to look at what they have been doing and to see how they are relevant to the Federal administrative process.

Now, to complete this agenda, what we need is an institution like the Administrative Conference to undertake the kinds of studies that marry not just academic expertise, but practical experience. That was a peculiar genius of the conference.

So I applaud this Committee for reauthorizing the conference, and I hope that it will be appropriated in this year and future years to continue this work and begin to solve these problems.

I thank the Committee, and I would be happy to answer any questions.

[The prepared statement of Mr. Breger follows:]

PREPARED STATEMENT OF MARSHALL J. BREGER

STATEMENT OF

MARSHALL J. BREGER
PROFESSOR, CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF
LAW

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

“60TH ANNIVERSARY OF THE ADMINISTRATIVE PROCEDURE ACT:
WHERE DO WE GO FROM HERE?”

WASHINGTON, D.C.

JULY 25, 2006

My name is Marshall Breger. I am a Professor of Law at the Columbus School of Law, Catholic University of America. From 1985-91 I was Chairman of the Administrative Conference of the United States (ACUS) and from 1991-93 I was Solicitor of Labor for the Department of Labor. I have taught administrative law and government regulation at various law schools including, the Catholic University, the University of Buffalo, the University of Texas, as well as the Jagellonian University, Krakow, Poland and the Hebrew University of Jerusalem.

I am pleased to participate in this hearing on the “60th Anniversary of the Administrative Procedure Act: Where Do We Go From Here?”

I

The Administrative Procedure Act passed in 1946 is often called the “bible” of administrative law. It is certainly the “default” position in administrative adjudication and rulemaking for agencies which lack other statutory instruments and is often “read into”

enabling statutes by the courts.

The Act, when passed, was an heroic effort to marry New Deal perspectives on regulation with traditional common law concepts of accountability and due process. As Justice Jackson pointed out, “[t]he Act... represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities.”¹ Nonetheless, it was a compromise, one that worked exceedingly well in setting out the parameters for the developing “administrative state” in the last half of the 20th century. It was able to do so, in part, because of judicial interpretations which breathed life into relatively “sparse” statutory language concerning such subjects as “notice and comment” or informal rulemaking; informal adjudication; and concepts like a “formal hearing on a record.”

The APA provided us with innumerable important innovations in administrative law including “informal” or “notice and comment” rulemaking; statutory codification of the various common law levels of the scope of judicial review of agency adjudication (including the requirement of “substantial evidence on the record”) and rulemaking, as well as the ALJ system. Later amendments triggered the transparency revolution exemplified by the Freedom of Information Act and promoted innovative adjudication and rulemaking techniques for federal agencies such as alternative dispute resolution (“ADR”) and “reg-neg” or negotiated rulemaking.

Beginning in the 1990’s, our perspective on the role of government and government regulation changed from the traditional New Deal paradigm. Indeed, Americans have shown a “deep uneasiness,” as James Freedman has put it, “about the

¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).

coercive and dehumanizing influence of bureaucratic organizations.”² One reason is a belief that bureaucracies “too often appear concerned primarily with formalistic adherence to their own wishes, rather than with seeking such a personalized response to the peculiarities of his specific circumstance.”³ This concern that the letter of the law often undercuts its “spirit” is well described in Philip Howard’s best seller, The Death of Common Sense.⁴

Others have urged that laissez-faire or market-based solutions are presumptively superior to regulatory regimes that have often placed substantial burdens on the American “administrative state.” Even more, we now recognize that the cumbersome “command and control” regulations of the New Deal era, ought to be replaced, wherever possible, by “performance based” standards. Indeed, some have argued that we are now at a kind of “constitutional moment,” to borrow from Bruce Ackerman,⁵ where the default position in American politics is market-based solutions and where the proponents of regulation have, as it were, the burden both of production and of proof.

But this innate skepticism towards government regulation only increases the need for thoughtful analysis about administrative law and administrative procedure. I can understand skepticism toward regulation or views that the default position should be a market solution. Nonetheless, however nostalgic we may be for the government “lite” of the early Republic, we cannot, following King Canute, simply wave away the regulatory impetus that is intrinsic to a technological and globalized age. While we may dislike and

² James O. Freedman, *Crises and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1068 (1975).

³ *Id.* at 1066.

⁴ PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (Random House 1994).

⁵ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 49-50, 107-08 nn.4-5 (Harvard Univ. Press 1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 311 (Harvard Univ. Press 1998).

distrust regulation we cannot dislike it so much that we do not care that what regulation there must be is both fair and efficient. If we are going to regulate, we want to do so in the most advantageous manner. That is why I applaud this Committee for thinking seriously and systematically about the last 60 years of experience of rulemaking under the APA and how it can be improved.

As we look back over the 60 years of the APA, it is hardly surprising that the administrative law “roadmap” has become somewhat dated, since the terrain and climate have changed as well.⁶ As I understand this hearing to be focused on issues related to rulemaking, I note below a number of areas where further research and rethinking regarding administrative rulemaking may be useful.

- **Cooperative regulation and its effect on rulemaking**

We live in an age of reconceptualization of administrative law in which scholars are proposing new paradigms such as “reflexive” regulation, “cooperative implementation,” and “interactive compliance.”⁷ Commentators have begun to ascertain a new approach to government intervention based on informal approaches to regulatory management. These initiatives, variously termed “democratic experimentation,” cooperative regulation, “the Renew Deal”⁸ are all premised on the view that “Americans still want government to tackle...[large problems]; they just don’t want government to tackle these problems via the characteristic institutional form of the New Deal- Great

⁶ For earlier perspectives, see Marshall J. Breger, *Administrative Law After Forty Years*, 33 FED. B. NEWS & J. 297 (Sept. 1986); Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337 (1986).

⁷ JAY A. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATOR COMPELSION* (Quorum Books 1988). “Interactive compliance rests upon the encouragement (and development) of reliable self-regulatory systems for corporate activity.” *Id.* at x.

⁸ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 352-56 (2004).

Society constitutional order, namely, bureaucracy.”⁹

The desire for flexibility has resulted in federal programs such as OSHA’s Voluntary Protection Program (VPP), and its Cooperative Compliance Program (CCP), the EPA’s Project XL, and its Environmental Leadership Program (ELP). It has also meant the promotion of performance standards and market based regulations such as deposit/refund systems, tradable pollution permits and pollution taxes, as well as the proposed elimination of numerous traditional command and control regulations. On occasion this has led to efforts to provide institutional carrots to give incentives for supererogatory performance as with the Wage and Hour “trendsetter” program.

These approaches are all premised on the use of individuated flexibility within the application of general norms. Some of these approaches (such as proposals for self-audits in OSHA and EPA) are a form of “self-regulation” within general regulatory guidelines. Others require the use of economic incentives and the use of information based requirements.¹⁰ All these “cooperative” appraisals raise issues of principles of neutrality and fairness. There is a need to develop systematic administrative procedures to merge traditional rulemaking concepts with these new structures across the board.

- **Public-private partnerships**

The 21st century will see an increased use of non-traditional government activity. This includes public-private partnerships, the out-sourcing of public functions through, as example, privately-run services and charter schools, and government corporations or Government Sponsored Enterprises (GSE’s) like the present day Fannie Mae. When government “contracts out” public functions, are all elements of administrative procedure

⁹ Michael Dorf, *After Bureaucracy*, 71 U.C.L.A. L. REV. 1245, 1271 (2004).

¹⁰ As in EPA’s toxic release inventory (TRI) program.

no longer relevant? How should the provisions of the Administrative Procedure Act relate to privatization and public-private partnership? This is a key problem that administrative law must face in the coming decades.

- **Developments in Informal Rulemaking**

The APA informal rulemaking process have been called “one of the greatest inventions of modern government.”¹¹ In recent years, however, we have seen increased efforts by federal agencies to bypass the statutory notice and comment requirements of informal rulemaking due perhaps to efforts by federal agencies to avoid the so-called “ossification” of the administrative process. This has occurred through a variety of “bypass” mechanisms. Agencies have used (or misused) statutory exceptions to “notice and comment” rulemaking including the “good cause” exception, interpretive rulemaking and use of so-called guidance documents in the expectation that they will have the functional effect of substantive rules. OMB has recently offered up a proposed “good guidance practices” memo to advise agencies regulating the promulgation of informal documents that *de facto* have the force of law.¹² And courts have variously attempted to sort this all out. As we know much of the prevailing “notice and comment” rulemaking processes are the result of judicial gloss on the APA’s statutory requirements. It is appropriate for Congress to consider the extant (and in some cases conflicting) judicial interpretations in this area in light of this rich judicial experience. It is appropriate as well for Congress to consider some basic legislative fixes of existing rulemaking procedures including: better definitions of the term “rule” and “order;” institutionalizing the practices of interim-final

¹¹ 1 DAVIS ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970).

¹² Office of Management and Budget, Proposed Bulletin for Good Guidance Practices, *available at* http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf (last visited July 22, 2006).

and direct-final rulemaking; the institutionalization of “hybrid rulemaking,” and providing a statutory basis for “Advanced Notice of Proposed Rulemaking” (APRN).

- **Effective Use of Science in Rulemaking**

One of the most contested issues in rulemaking is the question of how to ensure the appropriate factual predicate for rulemaking where complex scientific and technological issues are involved. This is, of course, a cognate problem to that which courts face in dealing with “junk science.” The OMB Bulletin on this subject “establishes that important scientific information shall be peer reviewed by qualified specialists before it is disseminated by the federal government” so as to “enhance the quality and credibility of the government’s scientific information.”¹³ The matter is highly charged, however, with claims that regulated interests have captured the process of scientific evaluation.

The Information Quality Act (also referred to as the Data Quality Act) was designed to promote transparency regarding the scientific basis of data used by agencies in formulating regulatory policy. Under the IQA affected parties can challenge data disseminated by a federal agency by filing a request for correction (RFC).

Now anything that promotes peer review and scientific debate should be applauded. And it is early days in our judgments regarding these OMB bulletins. I do believe, however, that systematic review of the effectiveness of those OMB guidelines is appropriate to ensure that both peer review and the IQA will succeed in their purpose and, at the same time, not paralyze the administrative process.

- **E-rulemaking**

¹³ Office of Management and Budget, Final Information Quality Bulletin for Peer Review, *available at* <http://www.whitehouse.gov/omb/nicmoranda/fy2005/m05-03.pdf> (last visited July 24, 2006).

E-Government is an umbrella term which includes: e-publication, “by far the most important and widespread government use” involving “dissemination or ‘publication’ of information;”¹⁴ e-filing or “online filing of official documents;”¹⁵ and e-procurement.”¹⁶ The E-Government Act, which codifies these innovations, “fill(s) a gap in the APA, which does not by express terms require the agency to make the comments its (sic) receives during the comment process available to the public.”¹⁷ Nevertheless it offers significant opportunities to incentivize public participation in the administrative process.

I know that this Congress has had some problems with the management of the E-Government initiative and that Congressional appropriators have recently applied spending restrictions, to the e-government “project.”¹⁸ Nonetheless, I believe that e-government and e-rulemaking in particular, offers extraordinary opportunities to increase both participation and transparency in the administrative process, thus increasing the democratic quotient of administrative law. E- rulemaking has the potential to enhance legislative transparency by spawning “deliberative forums... (and) panels of citizens, like traditional juries, that would advise about rulemaking.”¹⁹ As but one example, which I reuse for heuristic purposes only, David Fontana has urged a two-tier rulemaking system. Besides traditional “notice and comment” rulemaking, the system would offer “enhanced participation involving administrative jury deliberations (juries featuring stakeholders and members of the general public).” He proposed that “the more public participation in the promulgation of an agency rule, the more deference that rule should receive when it is

¹⁴ John C. Reitz, *Section VI: Computers and Law: E-Government*, 54 AM. J. COMP. L. 733, 734-35 (2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 744.

¹⁸ See Jason Miller, *Law Maker Tighten Reins on Project as Agencies Struggle to Explain Their Value*, GOV'T COMPUTER NEWS, July 24, 2006.

¹⁹ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 360-61 (2004).

challenged in court.”²⁰ This proposal may well be too complex for ‘practical implementation, yet it does focus us on the lodestar which should guide thinking about e-rulemaking- how to use it to maximize public participation, or what John Reitz terms “e-democracy.” In its deliberations, Congress must be chary that these efforts do not simply “increase the incentive for agencies and the public to ‘work around’ technological mechanisms and shift away from transparent toward less democratic, but more manageable models of back-room consultation.”²¹

- **Judicial Review of Agency Regulations**

As this committee knows, there is evidence that appellate courts are reversing more than 50% (some say 80%) of challenged agency rules. Whatever the exact number, this high incidence of reversal suggests either that agencies are not doing their job or that courts are substituting their own policy preferences for agencies or both. I know that this committee has commissioned the Congressional Research Service (CRS) to undertake empirical work on the first of these possibilities. And that empirical information, must, of course, inform this Committee’s deliberations.

Nonetheless, I believe it is useful for the Committee to consider whether it is worth rethinking the scope of judicial review of rulemaking as put forth in Section 706 of the Administrative Procedure Act as well as the rules of “deference” for “ambiguous” statutory delegations in light of *United States v. Meade*²² and cases following. It is more than reasonable to expect Congress to set general guidelines for the scope and standards of judicial review and to “privilege” the most appropriate canons of statutory

²⁰ David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81 (2005).

²¹ Beth Noveck, *The Electronic Revolution in Rulemaking*, 53 *EMORY L.J.* 433, 443 (2004).

²² *United States v. Meade Corp.*, 533 U.S. 218 (2001).

construction. At the end of the day the proper allocation of deference between the judiciary and federal agencies both as to agency findings of fact and agency interpretations of statutory instruments is an appropriate matter for Congress. In earlier proposed regulatory reform bills, Congress has on occasion suggested new approaches here and it remains worthy of exploration.

- **Revisiting Existing Regulations**

As Solicitor of Labor during the administration of President George H. W. Bush, I am sensitive to the need to revisit existing regulations. In an in-house review in the early 1990's of our regulations on the books I remember being astonished by the existence of rules related to gas lights more appropriate to the horse and buggy era.

I believe strongly in revisiting existing regulations for their present utility. I believe this requirement should exist beyond the present requirement of reexamination of rules that have or have had "a significant economic impact on a substantial number of small entities." I do not know if the proposed Sunset Commission will encompass such a revisiting of discrete rules or rather the review of programs and agencies. In any event, Congress should consider requiring agencies to review their existing rules every ten years according to a set of agreed on criteria.

I know that in HR 3356 the 108th Congress had contemplated a mechanism for revisiting existing regulations, so to speak, through establishment of a Joint Administrative Procedures Committee at the "back end" of rulemaking so as to provide a "fast track" method of revisiting regulations in force. I would suggest exploration of a different approach.

Placing the responsibility on the administrative agency itself is a preferable

procedure. It will allow for full use of the agencies experience and technical experience. Congress always retains the right to change an agency enabling Act so as to render a regulation nugatory or to prevent appropriation of funds for its enforcement.

- **Study of state administrative law initiatives**

We have seen in recent years a rebirth of interest in state and federal administrative law. Florida, Arizona, and California, to name a few, have rulemaking procedures from which the federal government can learn. A model state Administrative Procedure Act has been promulgated. States have long served as the “laboratories of democracy.” Systematic efforts should be made to study these local innovations and their relevance to the federal government. And of course, however problematic its implementation, the Congressional Review Act (CRA) continues to provide Congress an opportunity to visit major rules, at the “front end” before they actually came into force.

II

These are but a few of the emergent issues in administrative law related to rulemaking that require intensive study and analysis. But academic analysis alone will not suffice. The improvement of the administrative process can best occur in a context where academic analysis is tested in the crucible of experience – the experience of government agencies, of the regulated community and of public interest groups. The peculiar genius of the Administrative Conference of the United States (ACUS) was to provide such a crucible – one which married both analysis and expertise, “a partnership of the public and private sectors, but with a distinctively governmental flavor.”²³

The heart of the unique enterprise that was ACUS was the plenary Assembly.

²³ See Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 111 (1998). See generally Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813 (1992).

Meeting at least twice a year and consisting of up to 101 members, the Assembly included representatives of the each government department of agency-often the chief legal officer-private sector members from the practicing bar, scholars in the field of administrative law or government or others specially informed by knowledge and expertise with respect to federal administrative procedure” The membership was remarkable diverse for an advisory committee although the agency bylaws stated that “[e]ach member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private.”²⁴

It is because of the wealth of independent expertise represented in ACUS that the Senate Government Affairs Committee assigned specific responsibilities to ACUS to assist in implementing the Congressional Accountability Act of 1995. As the Senate Committee stated:

Because ACUS is comprised of experts and practitioners representing a wide range of perspectives and interests, and has a record of developing unbiased solutions to regulatory problems, the Committee believes that this agency is well suited to producing the studies and recommendations needed to fulfill the intent...[of the bill].²⁵

The Administrative Conference is uniquely suited to promote fairness and efficiency in our “administrative state.” ACUS studies and the forge of the “Assembly” process can provide invaluable assistance to Congress and the agencies in providing seasoned and practical approaches that draw on 60 years of administrative experience to propose

²⁴ Bylaw 302.2(a)(1), *reprinted in* 1994-95 Annual Report of the Administrative Conference of the United States 119 (Sept. 1995). In order to further encourage diversity, the Conference in 1984 restricted membership to four consecutive terms. And in order not to lose the wealth of expertise of veteran members an emeritus category was created that of Senior Fellows. While Senior Fellows did not vote in the Assembly plenary session they participated fully in the Activities of the Conference.

²⁵ Regulatory Reform Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995).

amendments to the Administrative Procedure Act. The ACUS study and review process can serve to defuse highly charged issues with partisan overtones, allowing, at least in part, the parameters of debate to be set by objective expert research, both analytical and empirical. As you consider how to move forward in this 60th anniversary of the APA I urge Congress to fully fund ACUS and allow it to serve all of branches of government in study and in understanding the “administrative state.” Rest assured, it will assist this Committee in its work.

I am pleased to answer any questions you may have.

Mr. CANNON. Thank you, Professor.

I couldn't help thinking while you were speaking that between the Ranking Member and me, we at least, maybe more than average between us, spent more than half of the life of APA as lawyers. That is a startling concept when you think about the evolution, especially recent evolution. In your litany of these issues, I was getting more and more nervous. How do we deal with this?

The answer, of course, is ACUS. We need to reauthorize it. We need to fund it. We need to get people who are smart together because even with all the scope of this Committee and its resources, we can't deal with the problems that are transforming before us as quickly as the litany that you presented. So thank you for that. We will have some questions.

Professor Magill, you are recognized for 5 minutes.

TESTIMONY OF PROFESSOR M. ELIZABETH MAGILL, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Ms. MAGILL. Thank you, Mr. Chairman. My name is Elizabeth Magill. I am a law professor at the University of Virginia. I teach and write in the fields of administrative law and constitutional law.

I am so pleased to be asked to testify before the Subcommittee because, like a lot in the administrative law community, we have all admired the work of the Subcommittee, the leadership in seeking the reauthorization of ACUS and its passage in 2004.

We have admired the efforts of the Subcommittee with the assistance of CRS's American Law Division to start to identify a research agenda to address important questions of administrative process and funding projects like Professor West's and the project Professor Freeman testified about last fall and the fall of 2004. We are so excited about what is happening, and it is such a pleasure as a result of that to be asked to testify.

This hearing recalls the adoption of the APA and asks the question, where do we go from here? I am going to do my best in the last minute of my remarks to answer that question, but I have to say at the outset that I don't know exactly where we go from here because in my opinion we don't fully comprehend where we are right now.

That is, despite the scope and the significance of the administrative state, there is not enough, as all the witnesses to date have said, and I bet the subsequent witness will say and this Subcommittee knows so well, there is not enough systematic and careful work that asks about the way the administrative state works, actually what it does, and whether it does it well.

Nor is there enough systematic work about the various mechanisms we have and rely on to curb the exercise of agency discretion, congressional oversight, executive oversight, judicial review. There are lots of examples that highlight the lack of empirically grounded research and writing on the administrative state.

One of my favorites that I uncovered is that there is an often repeated statistic, repeated many times, that 90 percent of agency action is informal, that is it falls below the APA requirements. It is not formal enough to invoke the APA requirements. I traced the origin of the statistic and the author of the statistic said, this is a guess. So I think the first step to studying the course for the future

is the investment of resources in careful study of the most pressing issues that arise across a range of agencies.

And if I might add a little bit to the pitch for why ACUS, it is wonderful that it is here, why it needs to be appropriated, I think administrative process is a little different than a lot of other questions we might want to address. And that is because administrative agencies do a wide variety of things in a wide variety of ways. So there is an enormous complexity.

At the same time, I think most people who study them think there are enough similar tasks that they do, for instance, relying on science to make decisions, a similarity in their processes, that you can generalize across agencies. But that is a pretty tough task to produce useful answers to questions that both take account of the complexity that is across the administrative state, but also try to find generalizable lessons.

So I think that is an added sort of argument for why we need funding of a think tank like ACUS.

I think I was asked to testify because for the past several years I have been trying to find out exactly where we are now, which is what I said was I think the first step to figuring out where we go in the future. With a colleague at the University of Michigan, Steve Croley, we have been working together to try to provide a comprehensive empirical picture of Federal agency decision-making.

Our data, our project will present pretty detailed data on the frequency and type of decisions that Federal agencies make, both across agencies and across time. Our goal is to explain with attention to the legal parameters of agency decision-making tools, as in-depth a data as is available on the frequency, including the changing frequency over time, of agency reliance on these tools. By "these tools," I mean rulemaking, adjudication, litigation on behalf of agencies, and guidance.

Our data is presented in the aggregate, how many rules do we have across the Federal Government and how that has changed over time, if it has changed over time, and it is also agency by agency. So our project is, as I have described, quite descriptive, but we also try to address various questions that are raised by the descriptive patterns we uncovered.

We undertook this project because as students of the administrative state and teachers of administrative law, we were incredibly frustrated by the lack of comprehensive information about what agencies do, and whether it has changed over time, and if so, how. So our primary goal has been to supply what we think is missing, some certain basic comprehensive facts about agency behavior.

We have relied on a lot of sources in the work we have been doing. In identifying the sources, we I think have had an ACUS-like attitude, which is our preference was for data collected across a large number of agencies, collected by neutral entities at regular intervals. So we wanted to avoid collecting data agency by agency because that risks inconsistency in the way a single entity characterizes what it does.

Our sources are largely Government sources. They are OPM, the GAO, the Regulatory Information Service Center, OIRA at OMB, the GSA, the Executive Office of U.S. Attorneys, and the Administrative Office of the Courts. So the work of the project really has

been collecting and presenting in meaningful and useful form data that is already out there.

We are still very much in the process of writing and analyzing what we found. In January of 2006, we presented some preliminary findings, and let me give you a flavor of them. The core of the work is a chapter devoted to each of the major policymaking tools available to agencies, as I said, rulemaking, adjudication, Government litigation, and guidance. I will talk about rulemaking, adjudication and Government litigation very quickly, because I have 50 seconds left.

So knowing how many rules are promulgated each year is actually a pretty complicated enterprise. A rule is a legal term of art. There are different definitions of rules, and even within definitions, there are different types of rules. There are two sources that provide pretty good aggregate data and those are the ones we rely on.

Agencies together issue over about 4,000 final rules per year, an amount that reflects a gradual decline from the early 1980's when they issued over 6,000 rules a year, and 66 percent of all final rules come from agencies whose heads report to cabinet secretaries, and 10 percent come from the independent agencies. That is a decline from about 20 percent 2 decades ago, and the last 25 percent come from agencies like EPA that don't report to cabinet secretaries, but to the president.

Not all rules, though, have substantive effect. Some are ministerial. There are somewhere between, 1,000 and 1,200 rules each year that had a substantive effect. Among the substantive rules, about 500 to 700 are far-reaching enough that they trigger White House review. That number was closer to 500 in the 1990's and it is now, since 2000, closer to 700 each year. Of those 500 to 700, 45 to 75, depending on the year, are huge rules, for lack of a better term. They have an estimated annual impact on the economy of more than \$100 million.

I am going to skip to Government litigation because I think what we see there is—

Mr. CANNON. Ms. Magill, from my perspective, I am quite interested and you don't need to worry about the time.

Ms. MAGILL. Okay. All right. Sorry. These are red stop signs.

Let me talk a moment, half of a minute, about adjudication. Tracking adjudication, as many people at this table know, in the Federal Government is actually quite difficult. There are two different kinds of adjudicators, there are actually more than that, but administrative law judges, obviously, and what have been denominated presiding officers.

They are not administrative law judges, but they preside over evidentiary hearings. There is no current Government-wide collection of data on the number of adjudications performed each year. The vast majority of administrative law judges in the Federal Government adjudicate cases in the Social Security Administration. The Social Security Administration ALJs have since 1991 always constituted more than 72 percent of all Federal ALJs. After the Social Security Administration, the next highest employers of ALJs are Labor, the NLRB, and the Energy Department.

In the aggregate from 1991 to 2004, the number of ALJs in the Federal Government increased by 13 percent, and that increase, of

course, occurred during a period when total Government employment declined by about 15 percent. But the 13 percent increase was not consistent across agencies.

Basically, Social Security Administration ALJs increased, while other ALJs decreased. So Social Security ALJs increased 31 percent, while non-Social Security Administration ALJs declined 37 percent. Roughly speaking, you could say that the number of adjudicators in the Federal Government who are implementing regulatory programs, say, at the NLRB or in the Energy Department, declined, while the number of adjudicators adjudicating benefits in the Social Security Administration increased.

There are many adjudicators in the Federal Government, however, who are not ALJs. We know this from two surveys, the first one conducted under the auspices of ACUS, and the first one was in 1989. It showed that there were several thousand presiding officers in 1989. The author found 2,600 presiding officers. That number increased to 3,300 in a follow-up survey in 2002.

The largest users of presiding officers were in the Justice Department's Executive Office for Immigration Review, the Veterans Administration and the IRS. That was from 2002.

Last, Government litigation. I think it is less written about, although there are actually quite great data sources that tell you what is happening with Government litigation. That is one window onto the administrative state, observe the litigation that is brought on behalf of agencies, and also the defense of litigation when the United States defends an agency from a suit brought against it. Affirmative litigation is called U.S. plaintiff litigation in the reports, and U.S. defendant litigation is the defense of litigation.

A look at these data are actually revealing on a lot of different fronts. The most dramatic descriptive trend, my coauthor and I found, was a quite significant decline in U.S. plaintiff litigation starting from 1990 to the present. The Administrative Office of the U.S. Courts reports that U.S. plaintiff litigation declined by two-thirds in a 14-year period between 1990 and 2004, going from 30,000 U.S. plaintiff cases to 10,000 in 2004.

Another source we used was from the Justice Department which tracks the cases brought by United States Attorneys in U.S. Attorneys' offices throughout the country, which is the lion's share of litigation handled by the Justice Department. From 1991 to 2003, overall civil cases handled by the U.S. Attorneys declined by 11 percent, but the U.S. plaintiff cases declined by 60 percent, while U.S. defendant cases increased 11 percent. Affirmative litigation on behalf of every agency that the Justice Department represents declined, except for the Interior Department.

Kind of a whirlwind tour of statistics that we are going to present with more detail in our book. The goal, as I said, is to provide an accurate and systematic picture of the activities of the administrative state. Like the other witnesses, I hope this sort of grounded work will be a basis for moving forward, identifying the right questions to ask and potentially identifying solutions.

The data obviously raise a lot of different questions. Why in the last 5 years are there more significant rules being forwarded to the White House's OIRA for review? What accounts for the rise in presiding officers? Why is the number of regulatory ALJs declining?

And what is happening to the work that they did? Why has U.S. plaintiff litigation declined so dramatically?

So I think the real question that this Subcommittee is interested in is where do we go from here. My plea is we don't quite know where we are, and we need to invest more resources in figuring out where we are and identifying the important questions, and answering them in a systematic way, not by anecdote, not by haphazardly gathered data, but by very careful collection of information that establishes the facts on the ground and allows us to move forward.

Thank you very much.

[The prepared statement of Ms. Magill follows:]

PREPARED STATEMENT OF ELIZABETH MAGILL¹

My name is Elizabeth Magill and I am a law professor at the University of Virginia School of Law. Thank you for asking me here today.

My teaching and research are in the fields of constitutional law and administrative law. I have taught administrative law and related courses—food and drug law, advanced administrative law—since 1998. My academic writing in administrative law is about judicial review of administrative action and about the varied procedural choices agencies make when they implement their statutory mandates—whether, for instance, they adopt a legislative rule or adjudicate a case or bring an enforcement action in the courts. I have served as a reporter for the APA Restatement Project of the Administrative Law and Regulatory Practice Section of the American Bar Association.

I am especially pleased to be asked to testify before this Subcommittee. Like many administrative law professors, I have admired this Subcommittee's work on administrative process. The academics I know all cheered this Subcommittee's leadership in seeking the reauthorization of the Administrative Conference of the United States and we hailed its passage in 2004. We have also admired the efforts of this Subcommittee to, with the assistance of the Congressional Research Service's American Law Division, identify a research agenda to address important questions of administrative process and to fund several research projects.

I. WHERE DO WE GO FROM HERE?

This hearing, which recalls the adoption of the Administrative Procedure Act sixty years ago, has been convened to ask what the future holds. I will do my best to answer that question in a moment, but I must note at the outset that it is not exactly clear where we go from here. That is because we do not fully comprehend where we are this moment. Despite the scope and significance of the administrative state, there is not enough systematic work that identifies what agencies are doing and asks whether they are doing it well; nor is there enough systematic work that asks about the effects of the mechanisms used to curb agency discretion—Congressional oversight, Executive and judicial review. There are many examples that highlight this lack of empirically-grounded research and writing on the administrative state. As Professor Jody Freeman pointed out in her testimony before this Subcommittee in 2005, an often-repeated statistic was that 80% of EPA rules were challenged in court; the only problem was that this had no basis in fact as one study demonstrated. Another often repeated statistic is that 90% of agency action is “informal”—that is, it does not follow procedures specified in the APA—but, after tracing the origin of this statistic, I found that the author of the statistic represented it as a “guess.”

In my view, the first most important step to setting a course for the future is the investment of resources in careful study of the most pressing issues that arise across a range of agencies. This Subcommittee's leadership has started us down that road, and I will speak in a moment about work that advances that objective. But I do not have any doubt that more remains to be done.

Careful and systematic study is not an easy task and that is one reason why there is not enough of it. The administrative state is incredibly complex. Agencies have distinctive statutory mandates—some distribute benefits, some regulate the market, some protect the nation. They also follow different processes and have distinctive designs—Commission, Administrator, Cabinet level or not Cabinet level. They ad-

¹A revised version of this statement is published in the Appendix of this hearing.

dress a dizzying variety of tasks in varied ways. That complexity makes systematic and generalizable research very difficult to conduct.

At the same time, it is clear that administrative agencies are not so distinctive that one cannot generalize about their behavior and draw conclusions about what may trouble us about the soundness or wisdom of their activities. Of course, most agencies are subject to the basic template provided for in the Administrative Procedure Act. More than that, though, many agencies share similar substantive tasks—they must rely on scientific judgments to do their business or they manage large benefit programs or they are in the business of licensing firms before they enter the market. Looking across agencies to determine and assess how they perform these tasks is obviously a worthwhile endeavor. Agencies are also subject to similar controls. They are the object of close oversight by Congress, the Executive, and/or the federal courts. Thus, despite the enormous complexity of the administrative state, there are common issues and problems that affect a large set of agencies such that cross-agency study will repay enormous dividends and will guide administrative reforms.

To figure out where we go from here, then, we must invest the resources to study the general issues that affect a substantial number of agencies and, if warranted, identify problems and formulate solutions. I would emphasize that those resources must be put in the hands of people who will approach their study in a systematic way. In my view, such studies must rely on the time-tested methods of social scientific inquiry, rather than the haphazard gathering of data or, worse, anecdote. It is only careful study that can establish the facts of the matter and thus provide a sound basis for identifying problems that need to be rectified.

There are several promising signs that such study is starting to occur. In part, these developments are due to the efforts and vision of the Members and staff of this Subcommittee and the CRS. Re-authorization of ACUS has generated enormous enthusiasm in the administrative law community. The studies that this Subcommittee's efforts have spawned—Professor West's work on public participation in rule-making that we are hearing about today and Professor Freeman's study of judicial review of administrative action—are important efforts that will advance our understanding and clarify what, if anything, is needed in the way of law reform. More than that, in my corner of the world, an increasing number of my peers are convinced of the need for empirical study of the administrative state and an increasing number of people in law teaching have the necessary training to engage in rigorous empirical work.

II. ESTABLISHING AN ACCURATE PICTURE OF THE ADMINISTRATIVE STATE'S ACTIVITY

For the past several years, I have been working with a colleague to complete what I just testified was the most important step to take before we could identify what comes next—that is, we have been working on a project to find out exactly where we are now. My colleague is Professor Steven Croley at the University of Michigan Law School and we have been working together to provide a comprehensive empirical picture of federal agency decision-making. We have received several grants to support our work, including from the Milton and Miriam Handler Foundation and the Olin Foundation. Our goal, in the most general terms, is to describe what agencies do and how that has changed over time.

Our project will present detailed data on the frequency and type of decisions that federal agencies make, both across agencies and across time. Our book explains the legal parameters of agencies' primary decision making tools—including legislative rulemaking, adjudication, litigation, and agency guidance—and provides as in depth data as is available about the frequency, including change in frequency over time, of agency reliance on those tools. Our data is presented in the aggregate (how many rules across the federal government and how has that changed over time) as well as agency by agency. We also identify patterns in that data. Our project is heavily descriptive, but we also provide narrative explanation of why, when, and how federal agencies make decisions, and we address various normative questions implicated by our empirical findings as well.

Professor Croley and I undertook this project because, as students of the administrative state, we were frustrated by the lack of comprehensive information about agency decision-making. Most administrative law scholarship focuses primarily on judicial review of agency decision making. While obviously important, judicial reaction to agency work product is only one window onto the activities of the administrative state. Meanwhile, political scientists and economists who write about agency behavior are not generally attentive to the legal differences among the agencies' policymaking tools. As teachers of administrative law, we found no work that examined empirically the range and frequency of procedures agencies employ. More than that, no work provides a ready general source of data about the form and frequency of

administrative agencies' legal work-product. Our motivation for undertaking this project has been primarily to supply what is missing—certain basic, comprehensive facts—about agency behavior and agency decision-making.

Our effort has several goals. Most basically, we aim to shed descriptive light on fundamental but understudied questions about federal agency decision-making. For example: Exactly how often do agencies engage in rulemaking and adjudication processes under APA? Which agencies do so the most, and which the least? Have agencies engaged in more or less rulemaking, and adjudication, over time (and adjusting for variables like population, GNP, and legislative activity)? In addition, how many of which different types of rules—"regulatory rules," "redistributive rules," "governmental housekeeping rules," etc.—have agencies issued over recent years? How many staff have agencies committed to the adjudication processes over time? How many times do agencies sue to enforce their statutory mandates and how, if at all, has that changed over time? How often are agencies sued and required to defend their exercises of authority and how, and if so, has that changed over time?

A related goal of our project is to provide others with an empirical base from which others can draw their own conclusions about administrative government. We hope to inspire others to enlist the data we supply to advance their own research on agency behavior. Abstract discussions of administrative government should be grounded as much as possible in concrete facts about what agencies really do, and the facts we present will inform others' work.

Last but not least, we engage in analyses ourselves, practicing what we preach. That is, in addition to presenting the facts about the type and volume of agency activities, we consider how those facts might connect to perennial normative debates about, for example, executive versus legislative control of agencies, agency accountability and independence, and the appropriate size and role of the federal government, among others. We also explore our descriptive findings by running several statistical tests to evaluate hypotheses related to normative discussions of agency activity. For example, we investigate whether certain agency decision-making procedures increase or decrease with Republican or Democratic administrations, or in times of divided or undivided government, among other things.

We have collected data from a very wide variety of sources. In identifying sources, we had a strong preference for data collected across a large number of agencies, and collected by neutral entities at regular intervals. We wished to avoid collecting data agency by agency because of the risks of inconsistency this raises. Our sources are largely available from various government sources. The data come from, for example, Office of Personnel Management, GAO, the Regulatory Information Service Center, Office of Information and Regulatory Affairs at OMB, the General Services Administration, Executive Office of the United States Attorneys, and the Administrative Office of the U.S. Courts. Much of it is available in a raw form that must be analyzed and aggregated to be meaningful and appropriate for generalization. Most of the labor of our project consists of the legwork of finding, compiling, and aggregating data across many different sources, and then organizing and presenting that data in meaningful ways.

We are still in the process of producing our book. But in January of 2006, at the annual meeting of the American Association of Law Schools, we presented some of our preliminary findings. I will recount for you some of what we reported there.

The core of the book are chapters devoted to each of the major policy making tools available to agencies—rulemaking, adjudication, government litigation, and guidance. Let me provide a few highlights of our findings about rulemaking, adjudication, and government litigation:

***Rules:** Knowing how many rules are promulgated each year depends on the type of rule as well as the classification system of the entity that collects the information. "Rule" is a legal term of art and there are different definitions of rule and different types of rules. But, two sources, RISC and GAO, provide the most useful aggregate data on the number of rules issued each year. Relying on these data sources, we have come to the following preliminary conclusions.

First, agencies together issue just over 4,000 final rules per year, an amount reflecting a gradual decline since the early 1980s, when they issued just over 6,000 rules a year. Second, about 66% of all final rules come from agencies whose heads report to cabinet secretaries, while only about 10% percent come from the independent agencies, down from about 20% percent two decades ago. The remaining 25% come from executive-branch agencies, like the EPA, whose heads do not report to cabinet secretaries but to the President.

Considering proposed rather than final rules, the same general pattern emerges. Agencies now publish about 2,700 proposed rules a year, down from over 3,500 in the early and mid-1980s. Here, however, independent agencies publish a bigger share, 15–20% of proposed rules, with non-cabinet executive agencies publishing

just barely more than that, and the remaining 60% then coming from cabinet agencies.

Not all rules, however, have a substantive effect. Somewhere between 1,000 and 1,200 rules issued each year have a substantive effect. Among substantive rules, between about 500 and 700 rules each year are far-reaching enough to trigger White House review. The number was closer to 500 in the late 1990s, and approximates 700 each year since 2000. Of those, about 45 to 75 per year constitute huge rules with an estimated annual impact on the economy of more the \$100 million.

***Adjudication:** Tracking adjudication in the federal government is difficult because there are different types of adjudicators—Administrative Law Judges (ALJs) and Presiding Officers (POs)—who preside over evidentiary hearings and there is no current governmentwide collection of data on the number of adjudications conducted each year. For one putting together an accurate empirical picture of administrative adjudication, the primary sources are OPM personnel data, two publications by the ACUS in the late 1970s, and two surveys of non-ALJ adjudications conducted in 1989 and 2002.

The vast majority of ALJs in the federal government adjudicate cases in the Social Security Administration. SSA ALJs have, since 1991, always constituted more than 72% of the total ALJs in the federal government. After SSA, the next highest employers of ALJs are Labor, NLRB, and the Energy Department.

In general, from 1991 through 2004, the total number of ALJs increased by 13%, from 1191 to 1341. This increase occurred during a period when total government employment declined by 15%.

The 13% increase in the number of ALJs was not consistent across agencies. Social Security Administration ALJs increased by 31% while the number of non-SSA ALJs declined 37% between 1991 and 2004. In other words, the number of adjudicators who are implementing regulatory programs declined while those adjudicating benefits have increased.

Many who adjudicate cases in the federal government are not ALJs. We know from two surveys that there are several thousand POs conducting evidentiary hearings. In a 1989 survey, the author found 2,692 POs and this number increased to 3,370 according to a follow-up survey conducted in 2002. As of the 2002 survey, the largest number POs were in the Justice Department's Executive Office for Immigration Review, the Veterans Administration, and the IRS and the largest number of cases decided by POs were in EOIR, the IRS, and the Appeals Council of the SSA.

***Government Litigation:** One window onto to the administrative state is to observe litigation on behalf of agencies in the courts. This includes affirmative litigation—called "US as plaintiff" litigation—brought by the federal government as litigation whether the government is defending against a challenge to its activities—called "US as defendant." The Administrative Office of the Courts and the Executive Office of U.S. Attorneys each track this litigation.

A look at those data are revealing on a variety of fronts, but the most dramatic descriptive trend is the dramatic decline in "US as plaintiff" litigation. The Administrative Office of the Courts reports that US plaintiff litigation declined by two thirds in a 14 year period. In 1990, there were 30,000 US plaintiff cases and this declined to 10,000 in 2004. During the same period, US as defendant litigation increased dramatically, from just under 25,000 cases to nearly 40,000 cases.

The Executive Office of the US Attorneys reports similar data, although their data track agency litigation more closely because US Attorneys represent client agencies throughout the government. From 1991 through 2003, overall civil cases handled by US Attorneys declined by 11%. But US plaintiff cases declined by 60% while US defendant cases increased by 11%. Affirmative litigation on behalf of every agency that DOJ represents declined, except the Interior Department.

This whirlwind tour of statistics provides just a slice of the data we will present in our book. As you can see, our goal is to provide an accurate and systematic picture of the activities of the administrative state. It is our hope that this sort of grounding will be a basis for moving forward by identifying the right questions to ask. And the data raise many questions: Why, in the last five years, are there more "significant" rules being forwarded to OIRA for review? What accounts for the rise in POs? Why is the number of regulatory ALJs declining? Why has US Plaintiff litigation declined so dramatically?

III. WHERE DO WE GO FROM HERE?

So I return to the question I started with, namely, where do we go from here? As I said at the outset, I do not know where we go next because of the dearth of

sound and careful work about where we are now. I am absolutely confident that further study is necessary to identify problems and formulate solutions. And the reauthorized ACUS gives is a real opportunity to move forward. Once funding is secured, many will clamor to fund various research projects. They may disagree on the priority, but few will disagree about the central need for more and more rigorous work about what is occurring at agencies. And there are many worthy research projects. In the fall of 2005, you heard testimony from Professor Jeffrey Lubbers, Mr. Mort Rosenberg, and Professor Jody Freeman, all suggesting possible avenues for research of a reconstituted ACUS. I have read their testimony and believe they made extremely valuable suggestions. I will add a few of my own to the list. My suggestions are not detailed proposals for study, but what I view to be the most important general areas for research.

External Agency controls: To my mind, a central question about agency activity is whether and how the various oversight mechanisms that are in place for agencies work. Agencies are subject to control and oversight by Congress, by the Executive, and they are subject to judicial review by courts. To my mind, asking about the function and efficacy of these control mechanisms is probably the most important question we can be asking. Thankfully, there is work that has been and is being done on these areas. Professor Croley has carefully studied the White House Review of agency rules and Professor Freeman is now engaged in her own comprehensive study of judicial review of agencies. These two studies are notable for their systematic—as opposed to ad hoc—approach and they have and will teach us a lot. But we need to do more because these external controls on agencies are so important and it is a complex enterprise to assess their efficacy. In my view, we are just at the beginning of building an accepted base of knowledge and moving toward conclusions about the wisdom and efficacy of these control mechanisms.

Internal Agency Controls: Another promising area for research is to get inside the agency and study how agencies make their important decisions. My own research has made me very interested in why it is agencies choose to implement their mandates in such different ways, some relying heavily on adjudication, others relying heavily on rules. But there are many other questions, for instance: When and why do agencies adopt enforcement guidelines? How do they organize internal appeals from front-line decision makers? How do they set their regulatory priorities? These questions about the internal decision making process of agencies are central to understanding why they behave the way they do and, as a result, are worthy of sustained attention.

Effectiveness of Rules. Many have noted that we have no way to determine the effectiveness of rules after they are in place. Among other things, we presently have no mechanism to determine whether the projections contained in the cost-benefit analysis when the rule is adopted turn out to be accurate in the long-run. Answering this question may not answer questions about the overall efficacy of regulations, but it would be a useful question to ask and, more importantly, it is just the sort of analytic task that a think tank arm of government could design and conduct. A research program aimed at identifying the promising ways to go about assessing the costs and benefits after implementation and comparing them to earlier projections would be a worthy enterprise.

Thank you for inviting me here today. I am gratified by the interest this Subcommittee has shown in the efficacy and fairness of administrative process.

Mr. CANNON. Thank you. I look forward to your report.

Professor Coglianese, you are recognized for 5 minutes or whatever time you would like to take.

TESTIMONY OF PROFESSOR CARY COGLIANESE, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Mr. COGLIANESE. Thank you very much.

Chairman Cannon, and fellow Members of the Subcommittee, I appreciate the invitation to testify here today. I recently joined the University of Pennsylvania Law School faculty, after spending 12 years at the John F. Kennedy School of Government, where I remain a senior research fellow and continue to do work on administrative law, with a particular emphasis on empirical inquiry of the regulatory process.

I would like to take my time today to talk about the role of information technology in the rulemaking process, and what kind of implications that has for thinking about the Administrative Procedure Act in the next 60 years. I would like to make three main points.

First, information technology is here to stay. It is an important fixture in the administrative process. Second, empirical research on the effects of information technology is important for decision-makers to have available in deciding how to deploy information technology in a smart way. And third, information technology projects present key management challenges, some of which will demand congressional involvement in oversight.

Let me take each of these in turn. First, information technology has become a major issue in how we think about the rulemaking process today, and it will only continue to be a major issue in the future.

Now, that is, I think, something that is quite different than at least the first 50 years of the Administrative Procedure Act. During that time, information technology moved roughly from carbon copy to photocopy, but the way in which information was managed by regulatory agencies remained largely paper-based. People who wanted to find out about the rulemaking process had to come to Washington, physically enter a docket room to gather information. If they wanted to participate in the regulatory process, there might be an occasional public hearing held somewhere in the country that they might attend, but generally speaking they would participate by picking up the phone or, more commonly, sending in a letter.

That has changed. It is now possible with information technology for people in Washington State, as well as Washington, D.C., to access information about any rule that Government agencies are developing. It is now possible for people all around the country to engage in an interactive iterative way with themselves or with Government officials over regulations, through the Internet.

This is a process that has been encouraged, that is the process of employing information technology in the rulemaking process, encouraged by both the Clinton administration and the Bush administration. The Bush administration most recently has created an e-rulemaking initiative which has produced an online portal called *Regulations.gov* at which place any member of the public can go and find out about any proposed rule that is open for comment and comment on it.

The e-rulemaking initiative is now also developing a Federal docket management system which will be a single location on the Internet where eventually a member of the public could go and find all the supporting documents for any rule across the Federal Government. These issues are, as I say, here to stay.

The second point is that we need to understand what difference this information technology is actually making, what kind of effects it is having on the rulemaking process. Now, one of the predictions that is most widespread both among Government officials, as well as among academics, is that the Internet will create what some people have even called a revolution in public participation, allowing citizens to play a role in rulemaking that they have never been able to play before and involving them on a frequent basis in the regulatory process.

This actually is an issue that researchers have examined quite extensively already. A growing body of research is developing on these questions. What is most surprising, perhaps given these predictions, is that the available research is showing that public participation has not increased in almost all rules due to the advent of the Internet.

I say that should be surprising given the predictions, but I think with hindsight it probably shouldn't be too surprising. Rulemaking, whether it is e-rulemaking or not, is still a fairly technical, and if not even arcane, area of public policymaking. So we probably shouldn't be surprised that many members of the public are not participating on a frequent basis.

Indeed, just as the Internet has lowered the cost to participate in the rulemaking process, it has also lowered the cost for members of the public to chat online with their friends or follow sports results or celebrity gossip or do other things that they would probably much rather do with their time.

Now, the fact that public participation has not expanded with the advent of e-mail and *Regulations.gov* does not mean that e-rulemaking shouldn't be pursued. There are other important purposes for using information technology in the regulatory process, from transparency, from public expectations about access to Government, from enhanced oversight by the legislature or the executive branch, various administrative efficiencies, and I also think a great deal of benefit for academic researchers.

But for all of those purposes, empirical research will be important to figure out which kind of technologies are actually serving those goals, how well are they serving those goals, and how can information technology be better deployed to serve those goals.

My third and final point is that in any information technology project, technology is only half the battle. Organizational and institutional factors matter a lot for the success of any information technology project. When we had our symposium here in December of 2005, a number of people expressed concerns and complaints about the current Federal Docket Management System, its searching capability, and the kinds of information that it holds.

Those are concerns that the people managing the project are aware of. But they might be among the first to acknowledge that the institutional structures right now for pursuing information technology projects relate to rulemaking, the FDMS project in particular, are really somewhat makeshift. It is the Environmental Protection Agency that is actually managing a Government-wide IT initiative related to rulemaking.

However much you may admire the work that the folks at EPA are doing, it is not clear that an individual regulatory agency should have the authority to be managing this project. We might look in the future at the model of the Office of Federal Register or the National Archives and Records Administration as a possible institutional way of organizing information technology projects in the future.

Of course, as with efforts for empirical research and other important efforts of Government, IT projects also need adequate funding vehicles as well. So there is a continued role for Congress in pur-

suing and overseeing information technology projects as they related to rulemaking.

I thank the Committee for the opportunity to talk with you about these issues and for your interest in these issues.

[The prepared statement of Mr. Coglianese follows:]

PREPARED STATEMENT OF CARY COGLIANESE

**Statement of Cary Coglianese
Edward B. Shils Professor of Law and Professor of Political Science
Director, Penn Program on Regulation
University of Pennsylvania Law School**

Before

**The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives**

July 25, 2006

On

**“The 60th Anniversary of the Administrative Procedure Act:
Where Do We Go From Here?”**

**Statement of Cary Coglianese
Edward B. Shils Professor of Law and Professor of Political Science
Director, Penn Program on Regulation
University of Pennsylvania Law School**

Before

**The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives**

July 25, 2006

On

**“The 60th Anniversary of the Administrative Procedure Act:
Where Do We Go From Here?”**

Mr. Chairman and Members of the Subcommittee, my name is Cary Coglianese and I appreciate the invitation to testify here today about the how the future of administrative rulemaking may be affected by advances in information technology.

I am the Edward B. Shils Professor of Law and Professor of Political Science at the University of Pennsylvania and a Senior Research Fellow at the John F. Kennedy School of Government at Harvard University. My research and teaching focus on regulation, administrative law, and environmental law, with a particular emphasis on the empirical evaluation of alternative regulatory strategies and procedures. I am a Vice Chair of the E-Rulemaking Committee of the American Bar Association's section on

Administrative Law and Regulatory Practice, and have published a number of research papers on e-rulemaking, or the application of advanced information technology to the rulemaking process.¹

Beginning in 2002, with support from the National Science Foundation's Digital Government Program, I convened a series of workshops designed to develop a research agenda on e-rulemaking.² This effort has played a role over the last several years in launching a new, interdisciplinary community of academic researchers working on e-rulemaking, connecting researchers with government officials responsible for information technology and rulemaking, and helping generate a growing body of academic research.³

In 2005, I worked with the staff of this Subcommittee as well as with the Congressional Research Service to convene a symposium on e-rulemaking held here on December 5, 2005. This symposium, sponsored by the Subcommittee, brought together legislative and executive branch staff and appointees with academic researchers, representatives from non-governmental organizations, and other interested members of the public for an extended dialogue on e-rulemaking and its implications for the future of administrative law.

¹ Cary Coglianese, *Weak Democracy, Strong Information: The Role for Information Technology in the Rulemaking Process*, in Viktor Mayer-Schönberger & David Lazer, eds., *From Electronic Government to Information Government: Governing in the 21st Century* (MIT Press, forthcoming 2007); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, *Duke Law Journal* (forthcoming 2006) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912660); Cary Coglianese, *E-Rulemaking*, in Ari-Veikko Anttiroiko and Matti Malkia, eds., *Encyclopedia of Digital Government* (Idea, 2006); Cary Coglianese, Stuart Shapiro, & Steven J. Balla, *Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System*, *Administrative Law Review* 57: 621-645 (2005); Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, *US: Journal of Law and Policy for the Information Society* 1: 33-57 (2005); Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, *Administrative Law Review* 56: 353-402 (2004); Cary Coglianese, *Information Technology and Regulatory Policy*, *Social Science Computer Review* 22: 85-91 (2004).

² The workshops were supported under NSF award number 0226053 (8/15-2002 - 7/31/2004). The final report from the workshops can be found on-line at http://www.ksg.harvard.edu/cbg/rpp/enrulemaking/papers_reports/E_Rulemaking_Report2004.pdf.

³ Much research produced on e-rulemaking in the last four years, as well as various related government reports and documents, can be found on-line at www.enrulemaking.org.

My testimony today draws on some of the presentations and deliberations that took place at the December 2005 symposium, but also on my other research related to e-rulemaking. My comments fall into three categories. First, I briefly review the progress made to date by the federal government in implementing e-rulemaking. Second, I report some of the principal findings from available empirical research on the impact of e-rulemaking on public participation in the rulemaking process. Finally, I highlight some issues that remain for consideration both by researchers as well as by legislative and executive decision makers.

I. Progress on E-Rulemaking

In the early to mid-1990s, as the Internet began to find its way into business transactions as well as everyday life, the movement to apply information technology to the rulemaking process began to take shape. During this time, the Clinton Administration's National Performance Review recommended that agencies begin to explore uses of new technologies in the regulatory process.⁴ The Administrative Conference of the United States (ACUS) issued a comprehensive report on the use of on-

⁴ Office of the Vice President, Accompanying Report of the National Performance Review, *Creating a Government That Works Better & Costs Less: Improving Regulatory Systems* 39 (1993), *available at* <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (recommending that agencies "[i]ncrease [their] use of information technology," as this would, among other things, "give the public easier and more meaningful access to rulemaking and policy guidance documents"); Office of the Vice President, Accompanying Report of the National Performance Review, *Creating a Government That Works Better & Costs Less: Reengineering Through Information Technology* 25, 28 (1993), *available at* <http://govinfo.library.unt.edu/npr/library/reports/it03.html> (recommending the use of information technology "to reduce the complexities that citizens face" and improve "[c]itizen access to government information and services").

line dockets by administrative agencies.⁵ Congress adopted amendments to the Freedom of Information Act and the Paperwork Reduction Act designed, respectively, to increase the on-line availability of information held by administrative agencies and to expand agency use of information technology.⁶ And the Office of the Federal Register began to make the *Federal Register* and the *Code of Federal Regulations (CFR)* available on-line.⁷

Administrative agencies themselves began to make rulemaking documents available on their web sites. In addition, a few agencies began to scan comments and process them electronically, while other agencies began to allow the public to submit comments via email. In 1998, the Department of Transportation (DOT) became the first regulatory agency to establish a department-wide, on-line regulatory docket.⁸ This docket – which can be found at dms.dot.gov – provides full access to all supporting documents and public comments related to the Department's rulemakings and gives member of the public an easy, electronic vehicle for submitting comments on proposed rules. Within a few years, the Environmental Protection Agency (EPA) and several other agencies also began implementing their own on-line docket systems.⁹

⁵ Henry H. Perritt, Jr., *Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication*, Report to the Administrative Conference of the United States (1995), *available at* http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic_dockets.htm (discussing technical and legal issues related to improving public access to the regulatory process through e-rulemaking).

⁶ 1995 Paperwork Reduction Act Amendments, Pub. L. 104-14, 109 Stat. 186 (1995) (codified at 44 U.S.C. §§ 3501–21 (2000)); Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 (2000)).

⁷ On-line availability of the *Federal Register* began in 1994, while the *CFR* became available in 1996. See <http://www.gpoaccess.gov/nara/index.html>.

⁸ U.S. Department of Transportation, Department of Transportation's Docket Management System, *available at* <http://www.DigGov.Org/Archive/Library/Dgo2001/DGOMAC/MEDIA/MEERS.PDF>

⁹ See Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, *Administrative Law Review* 56: 353-402 (2004); Barbara H. Brandon & Robert D. Carlitz, *On-line Rulemaking and Other Tools for Strengthening Our Civic Infrastructure*, *Administrative Law Review* 54: 1421 (2003).

In 2002, Congress passed the E-Government Act,¹⁰ which directs agencies to accept comments that are submitted electronically and to establish full electronic dockets for their rulemakings. The Act also authorized a new Office of Electronic Government within OMB, required that this office produce guidelines for all agency web sites, and generally encouraged agencies to explore new applications of information technology.

Beginning around this same time, the George W. Bush Administration launched an eRulemaking Initiative as part of a larger e-government program.¹¹ The eRulemaking Initiative is managed by EPA in cooperation with other agencies and with oversight by OMB. It consists of three parts.

The first part, completed in January 2003, involved the creation of a search-and-comment portal located at www.regulations.gov. The *Regulations.Gov* portal houses an on-line, searchable index of the Office of Federal Register's listings of notices of proposed rules. Users can search all proposed rules that are open for public comment and use the portal to submit comments on any proposed rule issued by any federal agency. The system automatically disseminates comments submitted through *Regulations.Gov* to the appropriate administrative agencies.

The second stage of the Bush Administration's e-rulemaking project, first launched in September 2005, involves the implementation of a multi-agency docket management system. The aim is to use the new Federal Docket Management System (FDMS) to store, and allow public access to, all documents related to every new regulation across the entire federal government. Currently, about ten federal departments

¹⁰ E-Government Act of 2002, Pub. L. No. 107-347, 166 Stat. 2899 (2002).

¹¹ OMB, The President's Management Agenda, Fiscal Year 2002, *available at* <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>

or agencies, or portions thereof, have migrated their dockets to FDMS, and plans are to have additional agencies join the system in the coming years.¹²

A third stage of the eRulemaking Initiative, still in planning, is intended to develop a standard suite of desktop tools relevant to the work of rulemaking. These tools would assist agency staff in data collection, analysis, decision making, and rule-writing.

In addition to these efforts by the Bush Administration, administrative agencies continue to explore new applications of information technology to the rulemaking process. For example, several agencies have experimented with on-line dialogues, which allow members of the public to interact with each other and with government officials in Internet discussion forums.

II. Empirical Research on E-Rulemaking

These various e-rulemaking efforts have been justified on many grounds, including improved governmental transparency as well as administrative efficiency.¹³ Another common justification for using information technology in rulemaking has been to increase public participation in what has otherwise been a relatively obscure governmental process. Both governmental officials and administrative law scholars have predicted that information technology will expand the role of citizens in rulemaking.¹⁴ One of the earliest administrative law articles on e-rulemaking claimed that the Internet

¹² Oscar Morales and John Moses, eRulemaking's Federal Docket Management System (May 24, 2006), available at <http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf>.

¹³ For a list of various goals that e-rulemaking could serve, see Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process, *Administrative Law Review* 56: 353-402 (2004).

¹⁴ See, e.g., *supra* note 4; Press Release, Executive Office of the President, Office of Mgmt. & Budget, OMB Accelerates Effort to Open Fed. Regulatory Process to Citizens and Small Businesses (May 6, 2002), available at <http://www.whitehouse.gov/omb/pubpress/2002-27.pdf> (explaining the Bush administration's effort to make the "regulatory process more open to the public" through on-line rulemaking).

will “change[] everything,” helping to ensure that “[c]itizens can . . . play a more central role in the development of new agency policies and rules.”¹⁵ Another legal scholar has argued that e-rulemaking holds the potential to “enlarge significantly a genuine public sphere in which individual citizens participate directly to help . . . make government decisions.”¹⁶

Such predictions might appear bolstered by recent rulemakings that have generated large numbers of citizen comments. Over the past few years, for example, a Federal Communications Commission (FCC) rulemaking on media ownership,¹⁷ an EPA rulemaking on mercury pollution,¹⁸ and a U.S. Forest Service rulemaking on road construction in wilderness areas¹⁹ have each elicited hundreds of thousands of comments, many of which were submitted electronically.

The existence of such rules with large numbers of comments raises the question of whether e-mail and other applications of technology like *Regulations.gov* have facilitated an increase in citizen commentary on administrative rules. So far, the early

¹⁵ Stephen M. Johnson, The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet, *Administrative Law Review* 50: 277, 277, 303 (1998).

¹⁶ Peter M. Shane, Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy, *IS: Journal of Law and Policy for the Information Society* 1: 147, 148 (2005); see also Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process, *Administrative Law Review* 56: 353, 373 (2004) (reporting on an e-rulemaking workshop at which “[m]any participants were convinced that [information technology] would lead to a dramatic increase in the number of comments submitted on agency rules”); Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, *Minnesota Law Review* 89: 342, 440 (2004) (“The new portals for notice and comment help make the public comment process more interactive and deliberative. This . . . increases public participation and democratic legitimacy.” (footnote omitted)).

¹⁷ JoAnne Holman, Strength in Numbers? Public Participation in the Media Ownership Proceeding at the Federal Communication Commission 3 (Aug. 31, 2005) (unpublished manuscript), available at <http://web.sil.umich.edu/tprc/papers/2005/426/TPRC%206049.pdf>.

¹⁸ David Schlosberg et al., ‘To Submit a Form or Not to Submit a Form. That Is the (Real) Question’: Deliberation and Mass Participation in U.S. Regulatory Rulemaking (May 5, 2005), available at http://erulemaking.ucsur.pitt.edu/doc/papers/SDEST_stanford_precon.pdf.

¹⁹ Stuart W. Shulman et al., Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences, *Social Science Computer Review* 21: 1, 2–3 (2003).

empirical research on e-rulemaking has examined this precise question more extensively than any other.

To date, the available information on *Regulations.gov* suggests that it has not resulted in any substantial impact on public participation in rulemaking. The Government Accountability Office (GAO) reported in September 2003 that only about a few hundred comments came in via *Regulations.gov* during its first five months in operation.²⁰ According to the GAO's study, *Regulations.gov* brought in only about eight of the 300,000 overall comments submitted to the EPA and twenty-one of the 18,000 comments submitted to DOT during the same time period.²¹ By October 2004, *Regulations.gov* had reportedly brought in 9,800 comments to various federal regulatory agencies,²² which is clearly a more substantial response but still only amounts to an average of two comments per the 4,900 rules the federal government proposed during this same period. Furthermore, we simply cannot know how many of the comments submitted via *Regulations.gov* would have been submitted to agencies anyway through other channels. More study of the impact of *Regulations.gov* is certainly not unwarranted.

Even if *Regulations.gov* has not increased the level of citizen comments on agency rules, there remains the question of whether *e-mail* has contributed to any such increase. One media report has mentioned that comments on DOT rulemakings "soared

²⁰ U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can be Improved* 23 (Sept. 17, 2003), available at <http://www.gao.gov/new.items/d03901.pdf>.

²¹ *Id.*

²² Rick Otis, *Federal eRulemaking Initiative*, Presentation at the Meeting of the American Bar Association Section of Administrative Law & Regulatory Practice 13 (Oct. 21, 2004), available at http://www.ksg.harvard.edu/cbg/rpp/enrulemaking/papers_reports/Otis___eRule_ABA_v3_final_10_21_04.pdf.

when electronic submission became routine.”²³ Comparing comments filed in 1998, the first full year of the DOT’s on-line docket, with comments filed two years later in 2000, it has been claimed that there has been nearly a twenty-fold increase in the average number of comments per rule.²⁴

However, any comparison of the average comments filed in two individual years can be misleading. Since rulemakings have not been randomly selected for email comment submissions, it is possible that DOT’s rules in 2000 were simply more controversial or otherwise more likely to generate comments than were its rules in 1998. It is also possible that the differences in the average number of comments stemmed from an exceptionally large number of comments in just one or two rules in 2000, even while most rules in both years still had about the same number of comments.

Recent studies have tested the impact of the availability of email and have found that, even after the introduction of email, most proposed rules still continue to generate relatively few comments, even though occasionally a rule will generate a high volume of comments. In a recent study of comments filed in seventeen randomly selected DOT rulemakings, 83 percent of the total comments came from just a single proceeding, a rule concerning the mandatory retirement age for commercial airline pilots.²⁵ According to the study, “most DOT rulemaking dockets established after [the introduction of DOT’s on-line system in] 1998 continued to receive only a few submissions during the notice-and-comment period.”²⁶ Similarly, according to a recent study of Federal

²³ Cindy Skrzycki, U.S. Opens On-line Portal to Rulemaking: Web Site Invites Wider Participation in the Regulatory Process, *Washington Post*, Jan. 23, 2003, at E1.

²⁴ *Id.*

²⁵ Ioana Munteanu & J. Woody Stanley, Participation in E-Rulemaking: Evidence from an Agency Electronic Docket (Nov. 1, 2004).

²⁶ *Id.*

Communications Commission (FCC) proceedings, “in 99% of dockets, the e-filing [option] does not seem to cause an increase in individual or interest group participation.”²⁷

A particularly careful study by political scientists Steven Balla and Benjamin Daniels was presented at the December 2005 Symposium on E-Rulemaking in the 21st Century.²⁸ Balla and Daniels examined over four hundred and fifty DOT rules, roughly half issued between 1995 and 1997 (before the introduction of the DOT’s on-line system) and the other half issued afterwards (between 2001 and 2003).²⁹ By systematically comparing comments before and after the agency’s on-line docket system, Balla and Daniels’ study was designed to avoid the problems of small samples or comparisons of just two individual years. They found, surprisingly, that commenting followed basically the same patterns across both time periods. The median rulemaking in 2001–03 generated nearly the same number of comments as the median rulemaking did in 1995–97 (thirteen versus twelve).³⁰ The *average* number of comments was different (628 in 2001–03 versus 162 in 1995–97), but only because of two (rare) outlier rules in the 2001–03 period that were especially controversial.³¹ By and large, most rules continued to generate relatively modest levels of comments even after email and on-line docketing.

Similar results can be found in other studies. According to study of nine of the most comment-prone DOT rulemakings in late 1999 and early 2000, for example, very

²⁷ John M. De Figueiredo, E-Rulemaking: Bringing Data to Theory, *Duke Law Journal*, vol. 56 (2006).

²⁸ Steven J. Balla & Benjamin Daniels, Information Technology and Public Commenting on Agency Regulations (Mar. 14, 2006) (updated version of paper presented at the December 2005 Symposium on E-Rulemaking in the 21st Century).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

few individuals filed comments in the vast majority of the rulemakings.³² At least at present, neither email nor *Regulations.gov* appear to have resulted in any dramatic increase in public participation in the rulemaking process. Most rules continue to generate modest numbers of comments -- and still fewer comments from ordinary citizens. As in the past, the occasional rulemaking does attract a large number of citizen comments, but these rules remain rare. Moreover, most of the comments submitted in these rare rules are quite unsophisticated and unhelpful to the agencies, if not even duplicative. For example, in another study presented at the December 2005 Symposium, researchers examined about 500,000 comments submitted in connection with an especially controversial EPA rule, finding that less than 1 percent of these comments had anything original to say.³³

Of course, with the hindsight made possible by this growing body of empirical research, it probably should not be surprising that information technology has not caused any substantial upswing in citizen participation in agency rulemaking, at least in most rulemakings. The subject matter of most agency rules continues to be rather technical, if not arcane. Information technology may lower the cost of finding documents about proposed rules or of communicating with government officials, but it has not reduced the non-technological barriers -- such as lack of knowledge or motivation -- that stand in the way of more widespread citizen participation in rulemaking. Filing a comment in a rulemaking requires knowing about agency rulemaking in general, as well as knowing

³² Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* (Resources for the Future, Discussion Paper No. 03-22, 2003), available at <http://www.rff.org/Documents/RFF-DP-03-22.pdf>

³³ David Schlosberg et al., "To Submit a Form or Not to Submit a Form. That Is the (Real) Question": Deliberation and Mass Participation in U.S. Regulatory Rulemaking (May 5, 2005), available at http://enrulemaking.ucsur.pitt.edu/doc/papers/SDEST_stanford_precon.pdf.

about the specific issues involved in a given agency rulemaking. Even with the Internet, it remains relatively costly for citizens to learn about a rulemaking proceeding and submit a substantive comment.³⁴ Moreover, these costs are what economists call opportunity costs. Even if the Internet decreases the absolute cost of submitting a comment to a government agency, it also decreases the absolute costs of other opportunities more attractive to most citizens, such as chatting with friends, keeping track of sports results, following the stock market, staying on top of celebrity gossip, or playing computer games.

The empirical findings to date suggest that non-technological barriers to public participation in rulemaking remain substantial. Perhaps the most that can be expected from e-rulemaking in terms of public participation, therefore, will be more modest, incremental changes. One incremental change could be an increase in participation by groups or individuals who are already highly motivated or reasonably sophisticated, such as by members of professional groups affected by proposed rules (e.g., pilots or flight attendants with respect to Federal Aviation Administration proceedings). A second incremental change could be an increase in the number of comments submitted on especially controversial rulemakings. Instead of seeing the exceptionally controversial rule receive hundreds or thousands of comments, as in the past, such rare rules may now start to receive tens of thousands or hundreds of thousands of comments. These effects may be notable in specific cases, but in general the level of public participation in rulemaking appears so far to have remained largely unchanged by the introduction of information technology.

³⁴ Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, *IS: Journal of Law and Policy for the Information Society* 1: 33-57 (2005).

III. Remaining Issues and Challenges

The empirical results obtained to date are significant as they draw into serious question a popular belief that e-rulemaking will usher in a revolution in citizen participation. By relying on the best available information, policy makers and designers of administrative procedures can make more realistic judgments about how to use information technology in the regulatory process -- or whether to change rulemaking procedures given the new technologies that are now available. Of course, even though the effects of e-rulemaking on levels of public participation do not fit the conventional wisdom, this does not mean that information technology has no value or should not be applied in new ways to the rulemaking process. As noted earlier, e-rulemaking may be justified for other reasons, such as improved transparency, enhanced ability for congressional or executive branch oversight, reductions in administrative costs, greater ease of compliance, or improvements in researchers' ability to study (and thereby generate ideas about improvements in) regulatory policy. All of these other possible rationales for e-rulemaking certainly merit their own consideration, as well as their own empirical study.

There is still a good possibility that for some of the challenges associated with government rulemaking, technological improvements may provide demonstrable benefits. Some technological improvements may simply enhance existing e-rulemaking systems. For example, a number of concerns about deficiencies of the FDMS were raised by participants in the December, 2005 symposium sponsored by the Subcommittee, such

as concerns about the ease and accuracy of FDMS' search capability or the completeness and consistency of the data fields the system uses. Other improvements may be needed in order to achieve new or broader objectives. For instance, as several observers have noted, it is now possible to create information systems that would enable users to move seamlessly between related legislation and legislative history, implementing regulations, supporting regulatory documents and public comments, guidance documents, and even court filings and decisions.³⁵ Right now, separate information systems have been developed for information produced in separate institutional settings, whether in Congress, agencies, or the courts. Yet for those who must comply with regulations, if no others, it would be markedly easier to understand and navigate through their regulatory thicket with clear computer linkages built into different types of regulatory information.

Making technological improvements – whether to existing systems or in order to advance still broader objectives – undoubtedly will require some institutional change. Some of these institutional changes will be budgetary, for resources will be needed not only to make the technological developments and modifications but also for empirical research needed to determine which technologies to deploy or to evaluate their efficacy in practice. Other institutional changes will be legal and jurisdictional ones. At present, the government-wide FDMS has been developed and managed by the EPA, working in consultation with other regulatory agencies. However much one may admire the work EPA has done, it is still far from clear that any individual regulatory agency is the proper

³⁵ Jeffrey Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Working Paper RPP-2002-04, Cambridge MA: Center for Business and Government, John F. Kennedy School of Government, Harvard University (2002) (also published in *Administrative & Regulatory Law News* 27: 6 (Summer 2002)); Richard D. Otis & Stuart C. Miles-McLean, *Federal Government Inter-Branch Integrated Regulatory Information* (May 24, 2006), available at <http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf>.

venue for the management of such a cross-agency initiative. After all, the current eRulemaking Initiative has faced certain financial and legal constraints owing in part to its somewhat makeshift institutional structure.³⁶ If the government does seriously intend to centralize all its regulatory dockets, consideration should be given to whether to vest management of such a central system in an independent records agency, much like the *Federal Register* is produced within the National Archives and Records Administration.

Successful e-rulemaking will ultimately require integrating both technological and institutional considerations, seeking the optimal fit of both organizational structures and technological capabilities to achieve relevant goals. Since information technology is intended to achieve improvements to both the substance and process of rulemaking, future empirical research will also be needed to determine the extent to which information technology advances the goals of those who implement it. Continued collaborative efforts between government and the research community should enable decision makers to make better judgments about any further modifications to and improvements in the rulemaking process.

³⁶ Cindy Skrzycki, Document Portal Sticks on Funding, *Washington Post*, January 10, 2006; Page D01.

Mr. CANNON. Thank you, Professor.

I intend to do more than one round of questioning, if that is agreeable to Mr. Watt. So I am going to limit myself to 5 minutes, and we will go back and forth, if that is interesting to you.

I was intrigued, Professor Coglianese, by your comments about empirical studies. Can I ask a couple of questions of you all, four or five?

How many of you have been online to look at Wikipedia or any other wiki? Do any of you do that? It is a fascinating experience.

How many of you have used Google as your search engine? Okay. How many of you have e-mailed, or how many of you have looked at gmail? Okay, you are obviously the guru here.

Are any of you members of an online community?

Let me tell you my experience. I don't spend a lot of time on the Net because my time is jerked around. But yesterday, I am too fat and I want to lose weight, and to do that I decided to Google "calorie counter."

So I ended up with a whole bunch of choices, and I went to a site called "sparklepeople" or something like that. It looked like it had a calorie counter, so I went to the site and couldn't find the counter without joining. And I thought, what the heck, I joined the community, so I signed up.

They asked for my e-mail. I was reluctant to give my real e-mail, and so I decided to see what Gmail is like. I don't mean to bore you here, but if you are talking about being empirical, you can't do empirical analysis retrospectively. You have to look at the tools that are available, and that is where I am sort of headed here. So Gmail is not e-mail.

Let me just say, you also look at Gmail. I am not recommending that because that would not be a congressional thing to do, but it was fascinating, and I decided to sign up for the Gmail account. And I used that as the e-mail address, and I hope I am protected because you use your cell phone number, by the way, when you do Gmail. It is not e-mail. It is a different thing and very interesting.

And then I became part of the community. It turns out the calorie counter was more awkward to use there than otherwise, but I did flip through the site to see how it worked, and it is a real community about people trying to use weight.

In that environment, in the environment we are in, which is an environment of dramatic change, just with the difference between e-mail, where you communicate back and forth, and Gmail, where I think what they say on the Web site is archive and don't delete.

So, for instance, I had a very interesting conversation on texting from my telephone to my son's telephone in quite a poignant point of our lives, and what I have on my telephone is my statement in the outbox and his statement in the inbox, and you can't put them together, at least not with the technology that I have.

So I have saved that, because it is sort of interesting. In fact, it is very interesting. I think 10 years from now he is going to be fascinated when we go back over that conversation. You can't do that given the technology that is the latest technology you can get that I have had, but you can do it with Gmail.

And so, when you talk about people being engaged, I am sort of lecturing here, but the reason I am, I really appreciated the input.

This has been a remarkable hearing. When you look at the decisions we have to make, and you all are focused on those and dealing with those, it has got to be done in the context not of what Government is or what has been happening or what agencies have been doing or what agencies haven't been doing, or what people are involved.

Given the nature of the community, you are not going to get people, individuals normally involved with a system that has questions about what records are available, when you have Google that makes everything available.

And so it seems to me part of what we need to do here is look at where we can go with people and their involvement. And you don't expect a guy who is not a geophysicist to be commenting on a rule that relates to something technical like geophysics. But you can get him involved if you have a community and a discussion and a conclusion and a choice.

And many times, we don't vote on the rules. We do the things that make rational sense, but you can get feedback from people in the context of maybe we should think about this. If you have gone through and read and evaluated and considered the implications of what you are doing, how do you think Government ought to react?

In that context, I think that we have to look back at our most famous and first democrat, Thomas Jefferson, who believed that that governs best which is closest to the people that are affected by it. How much Government are we going to be able to shift away from the Federal level and toward the local level? And by the way, you can multiply complexity because there are a lot more people at the local level than there are in Washington, D.C.

So I am going to ask some questions in my next round. My time is almost up. I hope you will help as we go forward with this project, and you guys have been involved and we appreciate it. We absolutely need, the thing that has come through with great clarity is we need ACUS.

ACUS is not what it was in the 1960's. ACUS is the place where we can draw with resources everybody together and think about these issues. They are not Republican issues. They are not Democrat issues. They are issues of our time. They are issues that are largely created by technology and if we don't answer them thoughtfully and with a thoughtful process, we are going to get the wrong kinds of answers.

So with that, I will yield back and recognize the gentleman, the Ranking Member, for 5 minutes.

Mr. WATT. Mr. Chairman, I am impressed.

Mr. CANNON. That I didn't ask a question? [Laughter.]

Mr. WATT. No, with your knowledge of the technology. While you were exploring the technology, I was out running. [Laughter.]

It will help you lose weight a lot faster.

Mr. CANNON. He doesn't need the calorie counter. I am almost ready to take that up. [Laughter.]

Mr. WATT. Just a suggestion to you, in case you are looking for a suggestion about how to lose weight. Don't count the calories, just burn them. [Laughter.]

Anyway, having said that, Professor Breger, your last round of statements, or your last subject that you dealt with, was some of

the creativity at the State level. I was hurriedly trying to read through your testimony. You gave it a sentence or two in your oral statement and you gave it a sentence or two in your written statement, too.

So can you tell us a little bit more about what some of the States are doing in terms of creativity that we ought to be at least thinking about?

Mr. BREGER. Thank you, Congressman.

Arizona has, institutionalized by the State legislature, a kind of State OIRA process, which has some innovative features for centralized review of rulemaking, including the centralized review also suggesting to the agencies when they should be re-looking at existing rules or not.

Florida has its own State APA which has dealt with interpretive regulations in innovative ways, also problems of waiver of regulation by agencies. California's Administrative Procedure Act has a different approach toward judicial review with different levels of deference.

And of course, the model State Administrative Procedure Act, which is a kind of model for the States, has a number of different approaches and solutions from the APA that are worth considering, including interpretative regulations among others. Those are just a few of the kind of creative activity that is going on in the States.

I would be happy to enlarge on that in written testimony.

Mr. WATT. I think that would be helpful to us, lest we have to go and Google what the States are doing. While my Chairman will be capable of doing that, I assure you I will not. [Laughter.]

I won't either e-mail it or Gmail it.

Let me try to tie together what Professor Magill and Professor Coglianese said. Is it possible that the decline in hearings and U.S. litigation may be being precipitated by those limited number of people who are engaging in e-technology? It seems to me that one possibility is that e-technology is certainly enabling people who are interested in an issue to be a lot more involved in discussing that issue quickly and interactively.

It used to be that you could only comment through the written, paper, slow-mail process. You got no response to that until the rule was actually made. Is this notion that I have that this increased interactive capability may be helping to sort through some of the disagreements that are taking place or were taking place that were not resolved, and maybe leading to a reduction in administrative procedures and/or litigation?

Ms. MAGILL. Sure. It is an interesting idea. I guess the theory would be that increased participation and potential collaboration resolves conflicts, and therefore agencies have less need to bring enforcement actions or pursue violators of rules or statutory violations. That is an interesting idea.

It is not something we had yet thought of, but we haven't yet zeroed in on this descriptive finding. At the moment, we are very big-picture, what has happened with rulemaking, what has happened with adjudication, what has happened with litigation. This descriptive trend surprised us. We presented it in January of 2006. There were several people from the Justice Department who were also surprised.

So we don't know the answer, and the best I can say is I think there are lots of possibilities. This is one possibility we can think about. We are some months away from thinking about it in a sort of rigorous way. What could possibly explain the reductions, and then try to test whether those factors do show up as causally related to the reduction, or at least correlated with the reduction.

So it is an interesting idea, and I am sad to say I can't yet tell you with confidence whether I think the data supports it.

Mr. COGLIANESE. We don't have any definitive research on that specific question, but it is highly plausible. In fact, one would expect that if members of the public can access Government information about rulemaking more easily, then their comments should be better informed and more helpful to the agency, right, which should enable the agency to make a better rule.

And if it is easier for interested members of the public, as you say, those who have a connection with the rule and an understanding of the general area, if it is easier for them to participate, then Government may hear more from them. And that may enable them to anticipate problems, anticipate conflicts, and create a better rule.

Right now, we don't have any research that examines the extent to which information technology creates better rules, but we would hope it does. And we would hope that with increased investments and innovation in information technology, we could come up with tools that would make rules even better; that would not only avoid litigation, but deliver more benefits to society.

Mr. WATT. Mr. Chairman, I know I am over my time, but since I am on a roll and I haven't gotten Professor West yet, can I ask one more question? Well, actually one more question after that, too, but it is not as important.

Mr. CANNON. Would the gentleman mind? I would like to follow up on the last question. Are you going to change the subject?

Mr. WATT. No. I think I am going to extend it to the pre-comment period with Mr. West. That is what he devoted most of his time talking about, and his student may want to join in the conversation with us.

I was just fascinated by how you can do this pre-comment period, get more interactive, especially through technology you could do it. But I don't know how you would do it without having a bunch of Government officials just sitting there e-mailing back and forth in every agency.

How would you structure this increased pre-comment notion that you think is desirable, that it seemed to me that you all thought it might be desirable, and maybe actually helpful in maybe decreasing even more the litigation, if you could get more people talking earlier in the process. But how do you structure something like that without just being so burdensome that it just takes up so much time that you can't manage it?

Mr. WEST. That is a great question. I don't have a ready answer for it.

You know, we wanted to see how much communication there was in the pre-notice phase of rulemaking, and with whom it took place and raise some issues. Should the pre-notice process be structured? That begs a number of other questions. In part, it depends on how

effective the comment phase of rulemaking is in redressing imbalances that occur during it.

Mr. WATT. It has to be structured to some extent, don't you think, because otherwise you don't know who to communicate with. Maybe that is a good dissertation undertaking for your student. She is smiling, hey, maybe I can structure something pre-comment period.

Mr. WEST. Well, that is a great question.

An obvious alternative would be to require agencies to use advance notices for all rules or for certain kinds of rules, maybe rules that reach a certain threshold of significance. Actually, our study was based in large part on interviews with seasoned public servants, many of whom had been working in the area of rulemaking for decades. They were uniformly against that, a requirement for advance notice is across the board. They thought that that would just impede efficiency too much.

Mr. WATT. And be burdensome.

Mr. WEST. It would be burdensome. It would delay the process.

Mr. WATT. It would take a lot of time.

Mr. WEST. Sure it would, yes. It is already a protracted process and they felt that it would lengthen rulemaking by years, in some cases.

Mr. WATT. I didn't change the subject, I don't think.

Mr. BREGER. Mr. Chairman, if I can just add, when I was Solicitor of Labor, when we did Advance Notices of Proposed Rulemaking, these were for major rules. We thought through in advance questions to ask with great particularity to see what the different interest groups in the regulated community thought about going in different directions. We found that was very helpful.

We also developed some roundtables trying to bring together different interest groups. I won't call them focus groups.

Mr. WATT. That is the same thing as a chat room?

Mr. BREGER. But in person. That was pre-high-tech. Again, that was very useful in bringing to our attention problems in our thinking and therefore make the rule better.

And finally, and of course with Professor Coglianese here, I have to mention negotiated rulemaking, which is another mechanism, where he is an expert, but another mechanism which we used at the Labor Department to bring out in kind of less than formal ways problems with a proposed rule to try to refine it and improve it in the rule development process.

Thank you.

Mr. CANNON. Neg reg, of course, was one of the great successes of ACUS.

Mr. BREGER. Yes.

Mr. CANNON. May I ask, how many students do we have who are associated with your project here? Do you want to raise your hand, those who are associated with Dr. West's project?

Mr. WEST. Just one.

Mr. CANNON. One. Do you have any other students associated with Dr. Magill's project?

Okay, we are not going to put anybody on the spot here. Thanks.

Let me follow up on this line of reasoning, whether we call it a chat room or in-person kind of thing. Let me give you another experience that I had, also related to my weight.

I have decided, since this discussion, I am going to find a keyboard that has more resistance so I am using more calories when I do that, but I noticed my weight was different in Utah than in Washington. I had the same brand of scale. I got it from Costco. It was very consistently different.

So I Googled the difference in altitude and weight. I got a very simple answer, but that was as part of a discussion board, and somebody responded to that simple answer with a more complex answer, and then somebody who had a Ph.D in something came on and said no and then gave a very big answer, a very complicated answer. The net effect is I think it is just a consistent difference in my scales.

But the reason I tell that story is because if you look at the world like having to do a pre-rulemaking and a notice of rulemaking or a negotiated rulemaking, you are dealing with what a few people in an agency are seeing, as opposed to what the world is seeing. And so maybe if you have a context for discussions, this rule is not working because I have a farm in Minnesota and it is a different situation from the people that you have regulated in other parts of the country.

If you have that kind of an environment, all of a sudden you get the right kind of input from the right kind of people, and then maybe some agronomist somewhere can point out, you think your farm is different, but in these regards it is the same. And the guy says, oh, yes, you are right. And so you have compliance by a guy who might otherwise not comply on the low end, and therefore less litigation, but on the other end you have people, associations of people that then focus on their interest and their differences and the way they communicate.

So if you look at the Internet as a way to do what we used to do better, it is not the same thing as saying, what do we have, what tools do we have available that allows us to do better what we ought to be doing, rather than what we have done. And so, let me just hope that that will ferment in your perfervid imaginations.

Ms. Magill, may I ask you a question? You said that the 90 percent agency actions informal statistic, when did he come up with that guess? Do you know?

Ms. MAGILL. It was a speech given in the middle of the 1970's, published in the Administrative Law Journal.

Mr. CANNON. We have been using that figure, that guess, for 30 years.

Ms. MAGILL. Professor Freeman had an example in the fall of 2005 in her testimony that I think people relied upon. This was the 80 percent figure, 80 percent of EPA rules are challenged in court. A study demonstrated that that was not true. I am not sure my 90 percent figure has been the basis for policymaking, but it is repeated a lot.

Mr. CANNON. It is repeated a lot, yes.

Ms. MAGILL. It is repeated a lot. It is a difficult enterprise to carefully answer the question, how much agency action is informal, even in one agency. So maybe a guess is the best we can do. I don't

think so. But to answer that question definitely would be hard, but again, we can do better than a guess, I think.

Mr. CANNON. And probably the difference is going to be relevant and significant as we go forward.

Ms. MAGILL. Yes.

Mr. CANNON. Dr. West, in your prepared statement, you said two agencies ordered their staff not to comply with your survey, despite a cover letter indicating that it was being conducted under the auspices of CRS and the Judiciary Committee.

What were the two agencies that refused to cooperate with you?

Mr. WEST. Caitlyn, correct me if I am wrong, but I think it was the Internal Revenue Service and the Department of Transportation.

Mr. CANNON. Ms. Miller, would you like to join us at the table? We won't even put you under oath. We would love to have you here.

Do either of you have a guess as to why those two agencies were uncooperative?

This goes on your resume. You have yet to testify. You have to say something at some point. [Laughter.]

Mr. WEST. The person from the IRS told us that. We assured everyone that the survey would be confidential and that it would not even identify specific regulations, but they were nonetheless afraid that that would establish a precedent that would lead to lawsuits or other efforts to open up, to get access to communications that occurred during the pre-notice phase of rulemaking. That was my recollection for IRS.

I can't remember the rationale that was given to us by the Department of Transportation.

Ms. MILLER. We did do the survey electronically, and we got some e-mails. We sent out the cover letter to all of our respondents, and then we sent out a preliminary e-mail with the link to the survey. We got some responses back that there were policies from the counsel's office in the departments that they were not to participate in any academic surveys. Their impression was that they were too busy.

Mr. CANNON. I suspect that means we have to haul them in here before this Committee, right?

Mr. WEST. I will add, though, that especially with the Department of Transportation, the other part of our study consisted of interviews with experienced Government officials, people from general counsel's offices and so forth. There were several people from Transportation that were extremely helpful in that part of the project.

Mr. CANNON. You know, there is an interesting overlay between what Congress can do and what our staff can do, and what an academic institution can do. I suspect that ACUS sort of helps bridge that gap by working together with staff.

Do you think, Professor West, that if ACUS had been involved that that would have affected these agencies' reaction?

Mr. WEST. Well, it might have, and this is something that Curtis Copeland and I discussed. ACUS is obviously a nonpartisan agency without any apparent institutional bias. So people in the agencies might be more forthcoming to cooperate in research by ACUS than

in research occurring under the auspices of, say, a congressional Committee.

Mr. CANNON. But would you indulge me for one more question? Dr. Breger, you headed ACUS for a period of time. In your experience, did ACUS ever work with Committee staff to get information that was otherwise difficult to get?

Mr. BREGER. We worked with Committee staff in the sense that Committee staff often suggested projects to us. We generally had a good working relationship with the agencies. The reason is that every agency by statute was a member of ACUS. Usually, their chief legal officer, or their general counsel, was the member or the deputy general counsel in charge of regulations. So they, in a sense, bought into the process.

As a result, we had a much easier time. I won't say "easy." We had a relatively easy time in gaining their cooperation, certainly on the front end of the study. One of my jobs after the plenary assembly approved a recommendation was to knock on everyone's door and say, why don't you accept it? That was not always so easy.

Mr. CANNON. You know, you gave a litany of the problems we have. Everybody has suggested that there is a vast amount that we don't know that is knowable, and ACUS can help us know that on the one hand. On the other hand, we have great opportunities to transform what we do, and having agencies buy in through ACUS makes the case very, very strongly, I think, for ACUS.

I yield back. Do you have more questions, Mel?

Mr. WATT. I just wanted to follow up with Professor Coglianese. Can you provide a little information about how EPA got to managing e-rulemaking, the whole process? And would ACUS be an alternative to that? Or what would be the logical alternatives to one particular agency taking the lead on something like that?

Mr. COGLIANESE. Certainly. The president established an e-Government agenda which had 24 different projects. E-rulemaking was one of those projects. For each project, the Administration designated a lead agency to administer these initiatives.

My understanding is that OMB hired a consulting firm to examine the hardware that was used by agencies that had online docket systems in place already, and that the consultant report identified the EPA as having the best hardware, which was not surprising since EPA was one of the most recent agencies, at that time, to adopt such a system. So it had the latest technology.

EPA has since worked with a great deal of cooperation by all the other agencies, 100 agencies or so, that are connected in this e-rulemaking initiative. Many of the agencies that issue a lot of rules are more active in working collaboratively with EPA, but the project is administered by EPA. That has led to some challenges when it comes to funding.

Initially, OMB was channeling funds on a pro-rata basis according to how many rules an agency issues, all coming from different agencies to fund this initiative. The congressional Appropriations Committee didn't quite agree with that as an approach to funding e-Government efforts and has since called into question that practice, and now it is much more difficult to fund this project adequately because of this makeshift institutional structure.

The other thing that has happened is that EPA really has no final say, in a sense, because it is not administering a statutory mandate that has vested management authority in it. So an alternative model for undertaking an e-rulemaking project like this that covers the entire Federal Government would probably not be ACUS, but something like the Office of Federal Register, which similarly is charged with an information management function that cuts across the entire Federal Government. There are standards for what goes into the Federal Register, what format it is in, and the like, and those standards apply to all agencies.

So something like that might be the more appropriate model to look at creating an institution that could manage information technology projects that cut across the Government, and hopefully extend indefinitely into the future and allow for innovation as technology improves over time.

Can I add one other comment, by the way, to your earlier point about chat rooms and involving the public in notice-and-comment rulemaking?

Mr. WATT. I have actually never been in a chat room.

Mr. COGLIANESE. I just wanted to note, it wasn't in my testimony, but it is in a forthcoming article I have written that will appear in the Duke Law Journal. There have been several agencies that have tried chat-room, online discussions, interactive forums, as ways of generating information.

There was one study by Woody Stanley, a DOT employee, where he looked at a project that the Federal Motor Carriers Administration had undertaken. He went to the Web site, and you could either join the chat room or you could file a comment.

Interestingly enough, the people who filed the comments and chose that avenue tended to be the usual suspects. But people who entered the chat room and discussed issues tended to be truck drivers who wouldn't ordinarily have filed comments. And through that interactive dialogue, Stanley reports, there were different kinds of issues that were presented to the agency than emerged in the comments.

The comments focused on a lot of technical issues, costs and the like. The truck drivers were raising issues of practicality, of safety and the like, that were not emphasized as much through the formal comments. So there is some work being done by agencies to explore these interactive opportunities, and some research being done on what it all means.

Mr. WATT. Your second dissertation is on structuring this e-rulemaking technology. We are giving her a lot of information today.

Thank you, sir. I appreciate it. I yield back.

Mr. CANNON. I have one very quick question, and then a couple of things for the record.

Professor Coglianese, have you worked at all with the IEEE to help develop standards in this regard? They are a massive resource, and you ought to connect with them.

In fact, let me suggest a name, Lee Hollaar, L-E-E, last name H-O-L-L-A-A-R, has worked on the Hill on the Senate side. He has a degree in computer science and also law, and he works closely with the IEEE. He is on several of their Committees, and we can get you his phone number. He would be a great guy to talk to

about this because he is smart and he has the background and he can connect with the folks who ought to be doing this at IEEE, and they ought to be part of our overall project.

And just for the record, it is Ms. Miller, right? And what is your first name?

Ms. MILLER. Caitlyn.

Mr. CANNON. C-A-I-T-L-I-N?

Ms. MILLER. Y-N.

Mr. CANNON. Y-N. Okay. Great. M-I-L-L-E-R.

Ms. MILLER. Correct.

Mr. CANNON. Just so you know, this is the permanent record forever, and you are here with us. We thank you for being here.

I ask unanimous consent that we keep the record open for 10 business days, working days, for follow-up written questions. Without objection, so ordered.

Let me just thank you all. We appreciate your expertise. It is a very difficult issue which is timely and very important, and we appreciate your involvement here today, but also in the broader project. We look forward to seeing you again soon.

Thank you.

We are adjourned.

[Whereupon, at 12:59 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

REVISED PREPARED STATEMENT OF PROFESSOR M. ELIZABETH MAGILL, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

My name is Elizabeth Magill and I am a law professor at the University of Virginia School of Law. Thank you for asking me here today.

My teaching and research are in the fields of constitutional law and administrative law. I have taught administrative law and related courses—food and drug law, advanced administrative law—since 1998. My academic writing in administrative law is about judicial review of administrative action and about the varied procedural choices agencies make when they implement their statutory mandates—whether, for instance, they adopt a legislative rule or adjudicate a case or bring an enforcement action in the courts. I have served as a reporter for the APA Restatement Project of the Administrative Law and Regulatory Practice Section of the American Bar Association.

I am especially pleased to be asked to testify before this Subcommittee. Like many administrative law professors, I have admired this Subcommittee's work on administrative process. The academics I know all cheered this Subcommittee's leadership in seeking the reauthorization of the Administrative Conference of the United States and we hailed its passage in 2004. We have also admired the efforts of this Subcommittee to, with the assistance of the Congressional Research Service's American Law Division, identify a research agenda to address important questions of administrative process and to fund several research projects.

I. WHERE DO WE GO FROM HERE?

This hearing, which recalls the adoption of the Administrative Procedure Act sixty years ago, has been convened to ask what the future holds. I will do my best to answer that question in a moment, but I must note at the outset that it is not exactly clear where we go from here. That is because we do not fully comprehend where we are this moment. Despite the scope and significance of the administrative state, there is not enough systematic work that identifies what agencies are doing and asks whether they are doing it well; nor is there enough systematic work that asks about the effects of the mechanisms used to curb agency discretion—Congressional oversight, Executive and judicial review. There are many examples that highlight this lack of empirically-grounded research and writing on the administrative state. As Professor Jody Freeman pointed out in her testimony before this Subcommittee in 2005, an often-repeated statistic was that 80% of EPA rules were challenged in court; the only problem was that this had no basis in fact as one study demonstrated. Another often repeated statistic is that 90% of agency action is “informal”—that is, it does not follow procedures specified in the APA—but, after tracing the origin of this statistic, I found that the author of the statistic represented it as a “guess.”

The first most important step to setting a course for the future is the investment of resources in careful study of the most pressing issues that arise across a range of agencies. This Subcommittee's leadership has started us down that road, and I will speak in a moment about work that advances that objective. But I do not have any doubt that more remains to be done.

Careful and systematic study is not an easy task and that is one reason why there is not enough of it. The administrative state is incredibly complex. Agencies have distinctive statutory mandates—some distribute benefits, some regulate the market, some protect the nation. They also follow different processes and have distinctive designs—Commission, Administrator, Cabinet level or not Cabinet level. They ad-

dress a dizzying variety of tasks in varied ways. That complexity makes systematic and generalizable research very difficult to conduct.

At the same time, it is clear that administrative agencies are not so distinctive that one cannot generalize about their behavior and draw conclusions about what may trouble us about the soundness or wisdom of their activities. Of course, most agencies are subject to the basic template provided for in the Administrative Procedure Act. More than that, though, many agencies share similar substantive tasks—they must rely on scientific judgments to do their business or they manage large benefit programs or they are in the business of licensing firms before they enter the market. Looking across agencies to determine and assess how they perform these tasks is obviously a worthwhile endeavor. Agencies are also subject to similar controls. They are the object of close oversight by Congress, the Executive, and/or the federal courts. Thus, despite the enormous complexity of the administrative state, there are common issues and problems that affect a large set of agencies such that cross-agency study will repay enormous dividends and will guide administrative reforms.

To figure out where we go from here, then, we must invest the resources to study the general issues that affect a substantial number of agencies and, if warranted, identify problems and formulate solutions. I would emphasize that those resources must be put in the hands of people who will approach their study in a systematic way. In my view, such studies must rely on the time-tested methods of social scientific inquiry, rather than the haphazard gathering of data or, worse, anecdote. It is only careful study that can establish the facts of the matter and thus provide a sound basis for identifying problems that need to be rectified.

There are several promising signs that such study is starting to occur. In part, these developments are due to the efforts and vision of the Members and staff of this Subcommittee and the CRS. Re-authorization of ACUS has generated enormous enthusiasm in the administrative law community. The studies that this Subcommittee's efforts have spawned—Professor West's work on public participation in rule-making that we are hearing about today and Professor Freeman's study of judicial review of administrative action—are important efforts that will advance our understanding and clarify what, if anything, is needed in the way of law reform. More than that, in my corner of the world, an increasing number of my peers are convinced of the need for empirical study of the administrative state and an increasing number of people in law teaching have the necessary training to engage in rigorous empirical work.

II. ESTABLISHING AN ACCURATE PICTURE OF THE ADMINISTRATIVE STATE'S ACTIVITY

For the past several years, I have been working with a colleague to complete what I just testified was the most important step to take before we could identify what comes next—that is, we have been working on a project to find out exactly where we are now. My colleague is Professor Steven Croley at the University of Michigan Law School and we have been working together to provide a comprehensive empirical picture of federal agency decision-making. We have received several grants to support our work, including from the Milton and Miriam Handler Foundation and the Olin Foundation. Our goal, in the most general terms, is to describe what agencies do and how that has changed over time.

Our project will present detailed data on the frequency and type of decisions that federal agencies make, both across agencies and across time. Our book explains the legal parameters of agencies' primary decision making tools—including legislative rulemaking, adjudication, litigation, and agency guidance—and provides as in depth data as is available about the frequency, including change in frequency over time, of agency reliance on those tools. Our data is presented in the aggregate (how many rules across the federal government and how has that changed over time) as well as agency by agency. We also identify patterns in that data. Our project is heavily descriptive, but we also provide narrative explanation of why, when, and how federal agencies make decisions, and we plan to address various normative questions implicated by our empirical findings as well.

Professor Croley and I undertook this project because, as students of the administrative state, we were frustrated by the lack of comprehensive information about agency decision-making. Most administrative law scholarship focuses primarily on judicial review of agency decision making. While obviously important, judicial reaction to agency work product is only one window onto the activities of the administrative state. Meanwhile, political scientists and economists who write about agency behavior are not generally attentive to the legal differences among the agencies' policymaking tools. As teachers of administrative law, we found no work that examined empirically the range and frequency of procedures agencies employ. More than that, no work provides a ready general source of data about the form and frequency of

administrative agencies' legal work-product. Our motivation for undertaking this project has been primarily to supply what is missing—certain basic, comprehensive facts—about agency behavior and agency decision-making.

Our effort has several goals. Most basically, we aim to shed descriptive light on fundamental but understudied questions about federal agency decision-making. For example: Exactly how often do agencies engage in rulemaking and adjudication processes under APA? Which agencies do so the most, and which the least? Have agencies engaged in more or less rulemaking, and adjudication, over time (and adjusting for variables like population, GNP, and legislative activity)? In addition, how many of which different types of rules—"regulatory rules," "redistributive rules," "governmental housekeeping rules," etc.—have agencies issued over recent years? How many staff have agencies committed to the adjudication processes over time? How many times do agencies sue to enforce their statutory mandates and how, if at all, has that changed over time? How often are agencies sued and required to defend their exercises of authority and how, and if so, has that changed over time?

A related goal of our project is to provide others with an empirical base from which others can draw their own conclusions about administrative government. We hope to inspire others to enlist the data we supply to advance their own research on agency behavior. Abstract discussions of administrative government should be grounded as much as possible in concrete facts about what agencies really do, and the facts we present will inform others' work.

Last but not least, we engage in analyses ourselves, practicing what we preach. That is, in addition to presenting the facts about the type and volume of agency activities, we consider how those facts might connect to perennial normative debates about, for example, executive versus legislative control of agencies, agency accountability and independence, and the appropriate size and role of the federal government, among others. We also explore our descriptive findings by running several statistical tests to evaluate hypotheses related to normative discussions of agency activity. For example, we investigate whether certain agency decision-making procedures increase or decrease with Republican or Democratic administrations, or in times of divided or undivided government, among other things.

We have collected data from a very wide variety of sources. In identifying sources, we had a strong preference for data collected across a large number of agencies, and collected by neutral entities at regular intervals. We wished to avoid collecting data agency by agency because of the risks of inconsistency this raises. Our sources are largely available from various government sources. The data come from, for example, Office of Personnel Management, GAO, the Regulatory Information Service Center, Office of Information and Regulatory Affairs at OMB, the General Services Administration, Executive Office of the United States Attorneys, and the Administrative Office of the U.S. Courts. Much of it is available in a raw form that must be analyzed and aggregated to be meaningful and appropriate for generalization. Most of the labor of our project consists of the legwork of finding, compiling, and aggregating data across many different sources, and then organizing and presenting that data in meaningful ways.

We are still in the process of producing our book. But in January of 2006, at the annual meeting of the American Association of Law Schools, we presented some of our preliminary findings. I will recount for you some of what we reported there.

The core of the book are chapters devoted to each of the major policy making tools available to agencies—rulemaking, adjudication, government litigation, and guidance. Let me provide a few highlights of our findings about rulemaking, adjudication, and government litigation:

***Rules:** Knowing how many rules are promulgated each year depends on the type of rule as well as the classification system of the entity that collects the information. "Rule" is a legal term of art and there are different definitions of rule and different types of rules. But, two sources, RISC and GAO, provide the most useful aggregate data on the number of rules issued each year. Relying on these data sources, we have come to the following preliminary conclusions.

First, agencies together issue just over 4,000 final rules per year, an amount reflecting a gradual decline since the early 1980s, when they issued just over 6,000 rules a year. Second, about 66% of all final rules come from agencies whose heads report to cabinet secretaries, while only about 10% percent come from the independent agencies, down from about 20% percent two decades ago. The remaining 25% come from executive-branch agencies, like the EPA, whose heads do not report to cabinet secretaries but to the President.

Considering proposed rather than final rules, the same general pattern emerges. Agencies now publish about 2,700 proposed rules a year, down from over 3,500 in the early and mid-1980s. Here, however, independent agencies publish a bigger share, 15–20% of proposed rules, with non-cabinet executive agencies publishing

just barely more than that, and the remaining 60% then coming from cabinet agencies.

Not all rules, however, have a substantive effect. Somewhere between 1,000 and 1,200 rules issued each year have a substantive effect. Among substantive rules, between about 500 and 700 rules each year are far-reaching enough to trigger White House review. The number was closer to 500 in the late 1990s, and approximates 700 each year since 2000. Of those, about 45 to 75 per year constitute huge rules with an estimated annual impact on the economy of more the \$100 million.

***Adjudication:** Tracking adjudication in the federal government is difficult because there are different types of adjudicators—Administrative Law Judges (ALJs) and Presiding Officers (POs)—who preside over evidentiary hearings and there is no current governmentwide collection of data on the number of adjudications conducted each year. For one putting together an accurate empirical picture of administrative adjudication, the primary sources are OPM personnel data, two publications by the ACUS in the late 1970s, and two surveys of non-ALJ adjudications conducted in 1989 and 2002.

The vast majority of ALJs in the federal government adjudicate cases in the Social Security Administration. SSA ALJs have, since 1991, always constituted more than 72% of the total ALJs in the federal government. After SSA, the next highest employers of ALJs are Labor, NLRB, and the Energy Department.

In the aggregate, from 1991 through 2004, the total number of ALJs increased by 13%, from 1191 to 1341. This increase occurred during a period when total government employment declined by 15%.

But the 13% increase in the number of ALJs was not consistent across agencies. Social Security Administration ALJs increased by 31% while the number of non-SSA ALJs declined 37% between 1991 and 2004. In other words, the number of adjudicators who are implementing regulatory programs declined while those adjudicating benefits have increased.

Many who adjudicate cases in the federal government are not ALJs. We know from two surveys that there are several thousand POs conducting evidentiary hearings. In a 1989 survey, the author found 2,692 POs and this number increased to 3,370 according to a follow-up survey conducted in 2002. As of the 2002 survey, the largest number POs were in the Justice Department's Executive Office for Immigration Review, the Veterans Administration, and the IRS and the largest number of cases decided by POs were in EOIR, the IRS, and the Appeals Council of the SSA.

***Government Litigation:** One window onto to the administrative state is to observe litigation on behalf of agencies in the courts. This includes affirmative litigation—called “US as plaintiff” litigation—brought by the federal government as well as litigation where the government is defending against a challenge to its activities—called “US as defendant.” The Administrative Office of the Courts and the Executive Office of U.S. Attorneys each track this litigation.

A look at those data are revealing on a variety of fronts, but the most dramatic descriptive trend is the dramatic decline in “US as plaintiff” litigation. The Administrative Office of the Courts reports that US plaintiff litigation declined by two thirds in a 14 year period. In 1990, there were 30,000 US plaintiff cases and this declined to 10,000 in 2004. During the same period, US as defendant litigation increased dramatically, from just under 25,000 cases to nearly 40,000 cases.

The Executive Office of the US Attorneys reports similar data, although their data track agency litigation more precisely because the reports categorize litigation based on the client agency that US Attorneys are representing. From 1991 through 2003, overall civil cases handled by US Attorneys declined by 11%. But US plaintiff cases declined by 60% while US defendant cases increased by 11%. Affirmative litigation on behalf of every agency that DOJ represents declined, except the Interior Department.

This whirlwind tour of statistics provides just a slice of the data we will present in our book. As you can see, our goal is to provide an accurate and systematic picture of the activities of the administrative state. It is our hope that this sort of grounding will be a basis for moving forward by identifying the right questions to ask. And the data raise many questions: Why, in the last five years, are there more “significant” rules being forwarded to OIRA for review? What accounts for the rise in POs? Why is the number of regulatory ALJs declining? Why has US Plaintiff litigation declined so dramatically?

III. WHERE DO WE GO FROM HERE?

So I return to the question I started with, namely, where do we go from here? As I said at the outset, I do not know where we go next because of the dearth of sound and careful work about where we are now. I am absolutely confident that further study is necessary to identify problems and formulate solutions. And the reauthorized ACUS provides an opportunity to move forward. Once funding is secured, many will clamor to fund various research projects. They may disagree on the priority, but few will disagree about the central need for more and more rigorous work about what is occurring at agencies. And there are many worthy research projects. In the fall of 2005, you heard testimony from Professor Jeffrey Lubbers, Mr. Mort Rosenberg, and Professor Jody Freeman, all suggesting possible avenues for research of a reconstituted ACUS. I have read their testimony and believe they made extremely valuable suggestions. I will add a few of my own to the list. My suggestions are not detailed proposals for study, but what I view to be the most important general areas for research.

External Agency controls: To my mind, a central question about agency activity is whether and how the various oversight mechanisms that are in place for agencies work. Agencies are subject to control and oversight by Congress, by the Executive, and they are subject to judicial review by courts. Asking about the function and efficacy of these control mechanisms is probably the most important question we can be asking. Thankfully, there is work that has been and is being done on these areas. Professor Croley has carefully studied the White House Review of agency rules and Professor Freeman is now engaged in her own comprehensive study of judicial review of agencies. These two studies are notable for their systematic—as opposed to ad hoc—approach and they have and will teach us a lot. But we need to do more because these external controls on agencies are so important and it is a complex enterprise to assess their efficacy. In my view, we are just at the beginning of building an accepted base of knowledge and moving toward conclusions about the wisdom and efficacy of these control mechanisms.

Internal Agency Controls: Another promising area for research is to get inside the agency and study how agencies make their important decisions. My own research has made me very interested in why it is agencies choose to implement their mandates in such different ways, some relying heavily on adjudication, others relying heavily on rules. But there are many other questions, for instance: When and why do agencies adopt enforcement guidelines? How do they organize internal appeals from front-line decision makers? How do they set their regulatory priorities? These questions about the internal decision making process of agencies are central to understanding why they behave the way they do and, as a result, are worthy of sustained attention.

Effectiveness of Rules. Many have noted that we have no way to determine the effectiveness of rules after they are in place. Among other things, we presently have no mechanism to determine whether the projections contained in the cost-benefit analysis when the rule is adopted turn out to be accurate in the long-run. Answering this question may not answer questions about the overall efficacy of regulations, but it would be a useful question to ask and, more importantly, it is just the sort of analytic task that a think tank arm of government could design and conduct. A research program aimed at identifying the promising ways to go about assessing the costs and benefits after implementation and comparing them to earlier projections would be a worthy enterprise.

Thank you for inviting me here today. I am gratified by the interest this Subcommittee has shown in the efficacy and fairness of administrative process.

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR WILLIAM WEST, THE
BUSH SCHOOL OF GOVERNMENT AND PUBLIC SERVICE, TEXAS A&M UNIVERSITY,
COLLEGE STATION, TX

Again, thank you for the opportunity to testify before your subcommittee. The questions you have posed about my statement are good ones. I have provided some brief answers below but would be happy to follow up at greater length on any of them.

1. *Why is it important to study how agencies develop proposed rules?*

The notice-and-comment requirements of the Administrative Procedure Act seek to ensure that participation in rulemaking is inclusive and transparent. Arguably, however, the most important policy decisions are usually made before these procedures go into effect. Proposed rules tend to be very detailed and represent a good deal of time and effort in their preparation. Although changes are sometimes made during the comment phase, they are difficult to make because of sunk organizational costs and because of the demands of due process. Changes in proposed rules tend to be made at the margins when they occur. Given this, it is important to examine the character of participation during proposal development. How prevalent is it? Is it broadly representative of all stakeholders? Is it open or transparent?

2. *In your written statement, you state that "scholars practically ignored the informal processes that precede the APA's notice-and-comment requirements and most other controls on rulemaking." Why is that?*

I suspect that part of the explanation is simply that this part of the process involves communications and organizational dynamics that are difficult to study. The data are not readily accessible (as we found out in our study), and the processes tend to be so idiosyncratic that they defy efforts at generalization. (That is, one or a few in-depth case studies of particular rules might not tell you that much about the process across the board.) Until recently, moreover, the study of rulemaking has been confined primarily to law scholars, who have naturally been more interested in formal procedures than informal processes.

3. *In conducting the study, you obviously had to solicit information from the agencies themselves. How were you able to ensure that the responses you received were forthright and verifiable? For example, what is the likelihood that the agency would admit, if you will, that it routinely consults with only one source in developing proposed rules?*

Great question! We bent over backwards to assure people that the interviews were confidential but there is still an incentive to look good. Frankly, I would not expect many bureaucrats to admit (even to themselves) that they are biased and fail to consult with all relevant stakeholders. Without addressing this question in a more definitive way, however, a highly relevant finding is that most communications with outside interests occur either at the invitation of the agency or at the initiative of the participant (who somehow finds out about the proposal). At least in a procedural sense, therefore, participation falls short of the inclusiveness that notice-and-comment seeks to ensure.

4. *To what do you attribute the low response rate of agencies to your study's survey?*

There may be several explanation:

- Paranoia. Notwithstanding our assurances that we would not identify specific individuals or rules, some people were no doubt put off by the possibility that they might get into trouble. A number of those contacted indicated that they had to ask their superiors if they could participate, and at least two agencies ordered their people not to complete the surveys.
- Time. People are busy and the survey required 20-30 minutes to complete.
- The wrong people. We sent the questionnaires to agency staff listed as in the Federal Register as “contact officers” for specific rules. As it turned out, these were not always people who were familiar with the rule in question. As it also turned out, they did not always pass the questionnaire along to individuals who were knowledgeable (as they were asked to do).
- A blunt instrument. As an effort to collect information on many different types of rules, our survey naturally had to pose questions in very general terms. Not all of the questions were relevant to all off the rules, and I think this put some people off (even though we did our best to deflect this). I’m sure some thought that we were hopelessly naive regarding the nature of rulemaking.

5. What are the benefits and detriments to soliciting input from interested parties prior to the formal promulgation of a proposed rule?

Benefits: Evenhandedness. Everyone—or at least everyone with access to the notice— would have an opportunity to be heard. This, in turn, might lead to agency decisions that are informed by a broader, more complete range of input. Even it did not improve the substantive quality of decision making, moreover, giving everyone a shot might add to the legitimacy of the process.

Detriments: It would make an already-protracted process even more drawn-out. According to most agency officials, moreover, advance notices would not provide much additional useful information. The argument they make here is that the agency knows who the relevant stakeholders are and it seeks to ensure balanced communications with them as a matter of course. Also, several interviewees indicated that public comment pursuant to open-ended notices (such as those that would be provided in an ANPRM) tends to be too unfocused to be of much value for decision makers.

6. If the participation in proposal development is not usually by general invitation, how can an agency know that it has the benefit of a representative cross-section of those who may be affected by the proposal?

It can’t for sure— at least at the time. Agency officials almost uniformly think they have a good feel for who all the stakeholders are but relying solely on this obviously runs the risk of confining participation to the “usual suspects.” Of course, a cynic might add (with some empirical support) that participation pursuant to notice-and-comment tends to be confined to organized interests. So you don’t know that you are tapping all relevant stakeholders here either.

7. With the availability off the internet, why can't an agency engage in proposal solicitations by general invitation?

I assume that this refers to identifying initiatives for proposed rules rather than to the development of proposals. There is no reason why an agency can't do this. As you know, the APA allows anyone to petition an agency to initiate a rulemaking proceeding. To me, at least, the more interesting question is how an agency decides which initiatives it will pursue out of many ideas for proposed rules that are brought to its attention.

8. Given the wide variation of practices and policies that you observed among the agencies regarding the subject matter of your study, do you think OMB's Office of Information and Regulatory Affairs should play a greater role in providing guidance?

This is a tough question that really has two parts. The first has to do with whether more uniformity in proposal development is desirable. Of course, the counter argument is that every agency operates in a unique environment and that indeed every rule is unique. Obviously, however, the intent of the APA was to standardize certain aspects of the administrative process across agencies and individual proceedings. Given that intent, coupled with the observation that many of the important determinations in rulemaking occur before the APA's constraints go into effect, you could certainly make the case for some general guidelines concerning the character of pre-notice participation. These might affect such things as what kinds of participation are permissible at what stages of the process and what kinds of participation must be docketed.

To the extent that some types of standardization might be appropriate, however, the second part of the question has to do with who should set the policies. Why OIRA? If Congress deems this to be an important issue, then why shouldn't it develop the institutional policy? After all, rulemaking is the exercise of delegated legislative authority. And procedures that set forth *how* agencies make decisions ultimately have an important bearing on *what* they do. We are essentially talking about a possible extension of the APA here, and I don't think this responsibility should be abdicated to the executive branch. (But I am somewhat of a legislative partisan.)

9. You state in your statement that two agencies ordered their staff not to comply with your survey despite a cover letter indicating that it was being conducted under the auspices of the Congressional Research Service and the Judiciary Committee. What were the two agencies that refused to cooperate with you? Why do you think that these agencies were uncooperative? Do you think these agencies would have been more cooperative if the study was being conducted by a reactivated Administrative Conference of the United States?

The two agencies were the IRS and the Department of Transportation. The IRS indicated to me that it was afraid of the precedent this might set. Notwithstanding the fact that we were not naming particular rules, it felt that this might open-up FOIA requests to obtain information about the development of specific regulations. I think DOT simply felt that complying with the survey

would be too time-consuming for their staff. (I should add that several high-level officials in DOT were extremely forthcoming in interviews about the rulemaking process in general.) I don't know, but I suspect that ACUS might have better access given its status as an entity without institutional or partisan biases.

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR MARSHALL BREGER, THE
CATHOLIC UNIVERSITY OF AMERICA—COLUMBUS SCHOOL OF LAW, WASHINGTON, DC

Questions for Professor Marshall Breger
The Catholic University of America – Columbus School of Law

- 1. It has been more than ten years since the Administrative Conference of the United States (ACUS or the Conference) was terminated. What, if any, problems have arisen in administrative law and practice that could have been addressed by the Conference if it was in existence over this period?**

As the “Administrative State” has evolved, major problems have arisen in administrative law and practice in the years since ACUS was terminated. I list below a number that could (indeed, I am certain would) have been addressed by ACUS if it had still been in existence.

- The problem of “interpretative rules” and issues of “fair warning” to the regulated community of the expectations of regulators.
- The challenge of e-regulation and e-democracy.
- Administrative law and regulatory policy issues of privatization and the “contracting out” of public functions.
- The intersection of administrative law and management issues in federal agencies.
- Administrative law issues of the “National Security State” including issues related to the homeland security.
- Empirical studies on the actual effect of OMB requirements including “prompt letters,” data quality and peer review issues.
- ADR and negotiated rulemaking.
- Fair and efficient implementation of FOIA.

- 2. If ACUS were reconstituted, what, if anything, would you recommend be changed about the Conference?**

One change worth working on is a legislative fix to resolve the so-called Emoluments Clause problem laid out in Gary Edles, *Service on Federal Advisory Committees: A Case Study of OLC’s Little-Known Emoluments Clause Jurisprudence*, 58 Admin L. Rev. 1 (2006). Put simply, at one point the Office of Legal Counsel took the position that “[f]ederal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause” a position which made private sector participation by law firm partners problematic. Although OLC has reversed its position as to most advisory committee members. *See*, Application of the Emoluments Clause to a Member of the President’s Council on Bioethics, 2005 OLC LEXIS 2 (Op. Off. Legal Counsel, Mar. 9, 2005), it has expressly declined to do so for ACUS members even though ACUS members serve entirely as non-government advisors in much the same way as individuals on other agency advisory committees.

I further believe that Congress should encourage, if not mandate, ACUS to undertake top to bottom single agency reviews of agency practices and procedures

as it did with the Internal Revenue Service during the 1970s. While a revived ACUS may wish to commence such a review only on an agency's request, Congress could certainly mandate such reviews to assist the agency to improve its administrative practices and procedures.

3. How important is it to preserve the bipartisan, nonpolitical nature of ACUS?

It would be vital to preserve the bipartisan, unpolitical nature of ACUS. Failing that, to be blunt, the "game would not be worth the candle."

4. Should ACUS be reconstituted as part of another agency, such as the Justice Department or the General Services Administration? Should it be privatized?

Constituting ACUS as part of a federal agency will in an essential way undercut the unique "added value" it brought to reflection and innovation in the administrative process – the marriage of public and private, of regulation and regulated. Operating under the auspices of any executive or congressional branch agency – be it Justice or otherwise, any future ACUS would lack the independence from whichever "party line" is regnant at the time. Similar issues would exist with a privatized ACUS.

I might add that federal judges, who were active participants in ACUS' activities, would likely not participate if ACUS were part of an executive branch agency or department.

5. What should be the priorities for a reauthorized ACUS?

The practices for a reconstituted ACUS should include at least the following:

1. A thorough 60 year review of the APA and the options for further improvement in light of the historical experience.
2. Increased empirical work on administrative law.
3. Promotion and implementation of agency ADR and negotiated rulemaking (the latter of which has remained underdeveloped in recent years).
4. Opportunities in cooperative federalism.
5. The administrative law issues related to privatization and contracting out of public functions.
6. Issues related to the better managing of private sector management tools and government agencies, where appropriate.
7. Research into government compensation programs for victims of mass tort situations and development of reform suggestions and options.

6. What, if anything, should be done to ensure that the Conference's membership is representative?

From my experience as a former Chair, the structure of ACUS as applied had little problem with “diversity.” In the middle of the Reagan administration we had members from unions, the public interest sector as well as academics highly critical of the administration in power. All these persons had an overriding commitment to making the administrative process work and as long as issues were framed in that manner significant substantive advances were possible.

7. Do you have any recommendations as to how ACUS could be given more authority/leverage to achieve implementation of its recommendations?

The problem of how to incentivize agencies to adopt ACUS regulations is a complex one. Below are a number of statutory proposals.

- ACUS could be required to send its recommendations to the relevant House and Senate appropriations and authorizations committees who could follow up as appropriate.
- Congress could explicitly mandate a yearly report from ACUS on agency implementation.

8. Should ACUS be given any administrative responsibilities (e.g., providing guidance on the implementation of ADR, Government in the Sunshine Act, Unified Agenda of Federal Regulations, Equal Access to Justice Act)?

ACUS is at its best in dealing with cross-agency issues in that it is not controlled by any particular parochial bias. Thus it would be appropriate, indeed sensible, to give ACUS statutory responsibility to provide guidance and develop “best practices” as well as administrative responsibility in the implementation of such government wide administrative law programs as the Government in the Sunshine Act, the ADR Act, Negotiated Rulemaking Act, etc. Congress has done this in the past. It should consider doing so in the future.

I would also urge that ACUS be charged with collecting and collating basic statistics regarding the administrative process.

Congress should also give ACUS administrative responsibilities for ADR and “regulated rulemaking” functions throughout the federal agencies.

9. Given the fact that the recommendations of the Administrative Conference of the United States (ACUS or Conference) were only advisory in nature, how were the agencies encouraged to adopt them?

Agencies were encouraged to adopt ACUS recommendations in three ways. First, an agency representative (often the general counsel) invariably participated in Assembly discussion on a recommendation (and often in the earlier committee discussions). Thus, they had a chance to “buy in” to the recommendation early on. Second, as Chairman one of my most important tasks was to meet with agency heads, and general counsel and “jawbone” them to favorably respond to

the recommendation. Third, good-government groups and specialized lawyers associations often followed up with an agency on behalf of an ACUS recommendation.

10. What were some of the Conference's most significant accomplishments?

One could not focus on the accomplishments of ACUS without starting with its work on alternative dispute resolution and negotiated rulemaking. The Administrative Dispute Resolution Act, Public Law 101-552, and the Negotiated Rulemaking Act, Public Law 101-648, would not have been passed without the studies and recommendations of ACUS. ACUS spearheaded agency implementation of these statutes.

Other significant accomplishments include Recommendations 68-7 and 70-1 to remove implements to judicial review of agency action. The first Recommendation proposed a modification to the judicial review requirements to eliminate the \$10,000 jurisdictional threshold where the injury resulted from adverse action by a federal department or agency. The second urged abolition of the doctrine of sovereign immunity that deprived the federal courts of jurisdiction to entertain citizen suits in the absence of an express abrogation of the doctrine by Congress. The third Recommendation proposed that plaintiffs' claims not be dismissed merely because a particular agency official had been improperly identified or could not be joined as a defendant. These recommendations were implemented by Congress in Public Law 94-574.

Another statutory accomplishment was Public Law 102-345, the Federal Aviation Administrative civil penalty legislation that adopted ACUS recommendations in this area. And one should not ignore Recommendation 80-5 on "Eliminating or Simplifying of the 'Race to the Courthouse'" in Judicial Review of Agency Action which lead directly to Public Law 100-236.

Of course, most of ACUS recommendations are implemented by the agencies themselves as, for example, the numerous recommendations implemented by the IRS after the ACUS "top-down" review of IRS procedures during the 1970s.

11. How was the Conference able to attract such high caliber members, staff, and fellows?

The Conference had a unique ability to attract the brightest faculty members, staff and fellows. There were a number of reasons for this. First, the entire academic community interested in administrative law viewed it as the premier vehicle for progress in administrative law. The same was true of the legal community where senior partners who were practitioners fully participated. At the same time most government entities assigned their general counsel or deputy general counsel concerned with administrative law issues to represent it at the Conference.

Because of the importance of administrative procedure to the judicial process, we had the privilege of extraordinary liaisons from the Judicial Conference of the United States.

I can personally attest to the extraordinary quality of the staff which I believe was due to the unique opportunity presented civil servants to both deeply think about practical problems in government regulation and to propose solutions.

12. What were the principal reasons why ACUS was defunded?

My general impression is that the defunding of ACUS reflected a (I am sorry to say) “short-sighted” decision to close down at least one federal agency to fulfill the generally salubrious promise of the “Contract with America” to reduce federal bureaucracy. Possessing only a “good government” constituency, ACUS had few robust interest groups to sustain it. In addition, it appears that various administrative law judges (ALJs) unhappy with Conference recommendations applicable to their concerns, urged the defunding of the Conference. This is a complex historical question, however, and the best and most unbiased study of the history can be found in Toni Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 *Ariz. St. L.J.* 19 (1998).

13. Is there any way to estimate the savings in taxpayer dollars that resulted from the Conference’s recommendations?

Just to put the matter in perspective, in its last year of operation, ACUS received an appropriation of \$1.8 million. The value of the pro bono contributions of the private sector members would far exceed this sum. While cost-saving assessments are necessarily speculative we may note that in 1994 the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million. In 1996, the Labor Department, using mediation techniques suggested by the Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS’ encouragement of administrative dispute resolution had saved “millions of dollars” that would otherwise have been spent for litigation costs. Since ACUS began the push for agency ADR in the early 1980’s both the Department of Justice and the ABA have “gotten on board.”

Similar financial savings have come from the use of settlement judges (ACUS Rec. 88-5). ACUS provided this innovative concept throughout the government. In just one agency, the National Labor Relations Board (NLRB) former Chairman William Gould noted that, in the first two years employing the new technique, the Board increased its settlement rate by about 25%. Chairman Gould estimated that each litigated case costs the government about \$35,000 and private parties spent at least as much. You can check the number of settled cases and do the math.

Other ACUS innovations including its early-on exploration of “user fees” and “self-audits” laid the groundwork for extremely significant government savings if these ideas are developed further.

While I have not researched this I have no doubt that each of the large executive branch agencies have administrative procedure reform divisions each of which most likely cost more yearly than did all of ACUS. To the extent to which ACUS is given responsibilities for “across the board” administrative law issues individual agency expenditures for this purpose may be to some small extent redundant as there would be less need to “reinvent the wheel.”

Finally, we must not neglect the value of fairness and efficiency in the administrative process, “dignitary values” not easily susceptible to monetization but central to the “rule of law.”

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR M. ELIZABETH MAGILL,
UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Professor Elizabeth Magill
Answers to Questions

1. A major theme of your testimony is the lack of empirically-grounded research and writing on the subject of administrative procedure and process. Why is there such a paucity of academic interest in this subject?

I am not certain why there is such a paucity of empirically grounded work. Empirical work takes a long lead time and usually requires funding in order to purchase or analyze large data sources. Academics who are housed in law schools have not traditionally been able to conduct such research, either because the lead time is too long or the funding is not available. I would suspect that one reason for the lack of such work is due to the demise of the Administrative Conference of the United States, which, when in operation, sponsored in-depth studies of administrative agency activity.

2. Would a reactivated Administrative Conference of the United States (ACUS) serve as a clearinghouse for such research and writing?

Yes, it would. I would hope that it would rely on time-tested social science methods in both identifying research problems and conducting the research, in which case it would be an invaluable resource.

3. Some have suggested that a private sector version of ACUS would be just as efficient as an independent, federally subsidized ACUS. What are your thoughts about this proposition?

I do not have views about a private ACUS.

4. In your prepared statement, you describe a research project that you and Professor Croley are preparing. How are you able to encourage and/or ensure agencies' cooperation with your research?

We have encountered no difficulty with agencies. We have found, however, that some agencies do not compile the data we would like and some data is not systematically collected across the government. For instance, no entity systematically collects data on the number and type of adjudications conducted by all agencies in the government.

5. What accounts for the general decline in the number of rules promulgated each year?

It would require a sophisticated study to determine the answer to that question and we have not done that. It could be any number of factors, including a reduction in the number of statutory provisions that need to be implemented by rules to changes in the overall priorities of agencies. We do not know.

6. What criteria did you use to determine whether a rule has a substantive effect?

The criteria we followed were the same criteria followed by the various entities from which we collected the data. We did not have an independent definition.

7. With respect to adjudication within the federal agencies, you state that there are two types of adjudicators - administrative law judges (ALJs) and presiding officers. Please explain the differences between the two.

Administrative Law Judges (ALJs) often preside over adjudications conducted by agencies, if the adjudication is “required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. 554. The statutory provisions governing ALJs can be found in 5 U.S.C. §§ 1305, 3105 et. seq. Presiding officers preside over hearings in federal programs but do not have the same statutory protections available to ALJs. These hearing officers are identified and described in John H. Frye III, Survey of Non-ALJ Hearing Programs in the Federal Government, 44 Admin.L.Rev. 261 (1992).

8. What explanation, if any, do you have as to why the number of ALJs has increased by 13% from 1991 to 2004, a period when total federal government employment decreased by 15%?

I do not have an explanation, but it is important to note that the increase in ALJs has not been evenly distributed across government programs that rely on ALJs. Social Security Administration ALJs increased during the period (by about 30%), while non-SSA ALJs declined (by 37%) during this period. Thus, ALJs who preside over benefit programs—who make up the lion’s share of the federal government’s ALJs—have increased while other types of ALJs have declined in the same period.

9. What explanation, if any, do you have as to why the number of cases in which the United States is a plaintiff has declined so dramatically in a 14-year period?

We do not have an explanation. Again, it will take a sophisticated study to determine the answer to that question. We intend to undertake it, but we have not yet done so. There are many possible reasons, including changes in the statutory framework that the government is enforcing to changes in priorities of government litigators over the years.

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR CARY COGLIANESE,
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Responses to Questions Submitted by the House Judiciary Committee's
Subcommittee on Commercial and Administrative Law

Cary Coglianese
University of Pennsylvania Law School

August 2006

Question 1: At the December e-rulemaking symposium, you noted that with the advent of the information age, regulatory agencies are pressed to become more transparent and thereby engage the public. Has this really happened yet?

Response to Question 1: Yes, although the extent to which agencies have taken such actions varies. The E-Government Act of 2002 requires federal regulatory agencies to post on-line announcements for new rulemakings and to accept on-line submissions of comments, to the extent feasible. In keeping with this legislation, regulatory agencies have in recent years taken a number of steps to make information electronically available to the public and to make it easier for members of the public to communicate on-line with agency staff. Among these steps have included the establishment of rulemaking websites, on-line dockets with supporting information, electronic discussion groups, and web-based links for submitting comments.

The Bush Administration has launched a government-wide e-rulemaking effort, through its Regulations.Gov portal, making it possible for citizens to comment electronically on proposed rules issued by any regulatory agency. The Administration is also currently implementing an electronic Federal Docket Management System (FDMS), which allows users to retrieve background information on proposed rules. At present, only a fraction of all federal agencies have their docket information available through this system, but the Administration plans eventually to migrate regulatory dockets for all federal agencies into FDMS.

The extent to which agencies provide on-line visibility of regulatory information and use the Internet to engage with the public does vary. Only a few agencies have so far used electronic discussion boards or chat rooms, and even those agencies have done so only with respect to a handful of issues. Consequently, although some considerable efforts to apply information technology are currently underway, there remains a still greater potential for uniformity and ubiquity in these efforts across the entire federal government.

Question 2: What are the principal benefits and detriments of the Federal Docket Management System?

Response to Question 2: If fully and effectively implemented, the Federal Docket Management System (FDMS) will make available on-line all supporting materials for federal rulemakings – at any of a hundred or more federal agencies and subagencies. For

many federal entities, this will be the first time that their docket information is available to the public on-line. For anyone interested in or affected by proposed rules, this will mark an advance in the accessibility of regulatory information and the functional transparency of governmental decisionmaking. This advance will be most notable for those agencies that do not already have an on-line docket system, but even for those that do already have systems the benefits that will accrue from having a uniform, government-wide system will be similar to those that accrue from having a uniform, government-wide system of public notice about rulemakings through the *Federal Register*.

The benefits of FDMS will be most meaningful if the system is designed and implemented properly. At this time, outside observers have expressed concerns about how FDMS has been developing. These concerns, some of which were aired at the December e-rulemaking symposium, include: the incompleteness of certain fields of information in the system; the lack of full text searching within dockets; the need for a listserv function that allows users to receive email alerts when new items are posted to a docket; insufficient consistency in meta-tagging documents; and the issue of how electronic records will be archived. Certain older agency websites, such as the one created at the U.S. Department of Transportation (DOT), are much more user-friendly than the current FDMS. Consequently, there is a concern that even though the FDMS will bring many agencies a full two steps forward into the information age, it could result in some agencies like DOT taking a step backward.

There are larger questions about the institutional structure surrounding the development of the FDMS. As I noted in my testimony, FDMS is currently being managed by the U.S. Environmental Protection Agency (EPA) and funded through apportionments from EPA and various other regulatory agencies. EPA has received accolades for its implementation of e-rulemaking, but the institutional structure for this project has been makeshift and cumbersome, and it has undoubtedly made it harder for the government to address concerns that have been raised about the design of FDMS. In order to sustain a government-wide docket system over the long term and ensure that it is properly upgraded as information technology progresses, a more stable funding base and institutional structure should be explored. The Congress should consider delegating development and management of e-rulemaking to a dedicated and adequately funded entity, along lines perhaps similar to the way that the *Federal Register* and *Code of Federal Regulations* are managed.

Question 3: How do you respond to the concern that the Internet/e-government rulemaking promotes “junk” comments as part of the notice and comment process?

Response to Question 3: The phrase “‘junk’ comments” presumably refers to brief, unsophisticated comments submitted by ordinary citizens that convey no information to an agency other than the submitters’ preferences. As I understand it, the concern is that e-rulemaking may result in a dramatic increase in such comments and that processing these additional comments will be time-consuming and costly for agencies, without any corresponding benefits in terms of additional information to aid with decision making.

At least when so understood, this concern appears to be overstated as an empirical matter. Agencies are simply not drowning in comments, even after they have allowed members of the public to submit comments by email. For most rules, the volume of comments appears to have remained basically at the same level as before email.

On occasion, particularly salient and controversial rules will generate, as they have always generated, large numbers of comments, most of them meeting the above definition of “junk.” With the Internet, the number of “junk” comments may well be higher for these most exceptional rules, increasing comments from the thousands to the tens or hundreds of thousands in some instances. Even these cases, though, do not appear to be generating any untenable processing burden on agencies. First, such highly salient and controversial rules are not common. Second, since “junk” comments are by definition brief and nonsubstantive, the time it takes to “weed” them out probably will never be overly excessive for an agency. Finally, some researchers are even beginning to develop software that will identify patterns in comments and at some point soon agencies may be able automatically to identify and categorize mass mail form letters.

Question 4: Some have criticized the Federal Docket Management System as imposing a one-size-fits-all standard that fails to take into account the individual needs and resources of various agencies websites. What are your views about this criticism?

Response to Question 4: There are both virtues and vices to uniformity in any domain of rules, procedures, and institutions. The challenge is to achieve an optimal level of uniformity, where the virtues can be maximized and the vices minimized (even if never eliminated). In the case of storage and retrieval of regulatory information, the federal government has favored uniformity for a very long time, thus we have had since 1936 a single *Federal Register* and it has been publishing proposed rules since 1947. We have had a “one-size-fits-all” publication called the *Code of Federal Regulations* since 1938. The rationale for creating these uniform regulatory publications also applies in the electronic age to docket information about regulatory decisions: uniformity makes it easier for citizens, affected businesses and nonprofit organizations, and Members of Congress to keep track of agency rulemaking.

As the FDMS advances this rationale for uniformity, it should be designed so as to avoid problems that can sometimes arise with standardization, even though they need not occur. One such problem comes when government standardizes on the least common denominator. Uniformity need not be based on docket systems of lower quality, but instead should maintain, if not even advance, the state-of-the-art in hardware and software. Developers of a uniform system should take the best features of existing agencies’ systems and make sure that the new system provides at least the same (if not better) level of usability and information access. So far, the current FDMS has yet to meet this criterion, at least in its interface and searching capabilities. Users do not find that it is as easy to navigate or effective at searching as the docket management system at EPA that it replaced. It is also not close to being as useable and effective as the older docket system developed by and still in use at the U.S. Department of Transportation.

A related problem can arise if uniformity is achieved by truncating information previously made available to the public by some agencies. Concerns have been raised that fields of information previously available to the public electronically will be lost as agencies move their own agency systems over to FDMS. Yet with effective design and adequate funding, FDMS can and should be developed in such a way as to ensure full retention of public information about rulemaking. A uniform system can be created that allows some flexibility, just as the *Federal Register* allows agencies to print whatever content they like in their preambles and rule sections, even while ensuring that common fields of information are tracked and published in a uniform manner.

Question 5: You state that “information technology has not caused any substantial upswing in citizen participation in agency rulemaking.” What explains this result?

Response to Question 5: I review the empirical evidence behind this result in my article, “Citizen Participation in the Rulemaking: Past, Present, and Future,” 55 *Duke Law Journal* 943-968 (2006). In that article, I also discuss in detail what explains these seemingly surprising results. The main reason is quite straightforward: most rulemakings involve issues that are of either low salience or high complexity (or both). Citizens who are not highly motivated to participate generally in politics and policymaking do not become more so, especially on even more obscure issues, simply because they can submit comments to regulatory agencies via the Internet. Furthermore, even though the Internet make it easier to learn about new rules and send in comments, information technology also makes it much easier for people to do other things that they would prefer to do, whether chatting with friends, keeping up with celebrity gossip or sports results, or playing video games. A substantial upswing in citizen participation requires not just new technology, but a substantial upswing in citizens’ motivation to get involved in the regulatory process rather than spending their time in other, more appealing ways.

Question 6: How can an agency cope with hundreds of thousands of comments received via email in response to a proposed and final rule?

Response to Question 6: Agencies do not need to cope with hundreds of thousands of comments very often. Only a small number of rules have ever generated this volume of commentary. In these rare cases, the burden is no doubt substantial but agencies have still managed. Fortunately, most of the comments usually submitted in these rules are terse form letters, whose pattern can be easily observed. In the future, advances in natural language processing and other developments in information technology are likely to make it easier for agencies to detect duplicate comments, as well as to identify issues and sort comments. The general direction appears to be one in which information technology will make things easier for agencies, even if in the occasional rulemaking it may also mean that even larger quantities of form letters are received.